Supreme Court, U. S.
FILED
AUG 25 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 75-283

FREDERICK BITZER, Chairman of the State Employees' Retirement Commission, ROBERT I. BERDON, Treasurer of the State of Connecticut, and NATHAN G. AGOSTINELLI, Comptroller of the State of Connecticut,

Petitioners,

v.

DONALD MATTHEWS, MORTIMER COVERT,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CARL R. AJELLO
Attorney General of Connecticut

SIDNEY D. GIBER
BERNARD F. McGOVERN, JR.
Assistant Attorneys General
30 Trinity Street
Hartford, Connecticut

INDEX

	Page
Reference to Opinions below	1
Grounds of Jurisdiction	2
Question presented	2
Constitutional provision involved	2
Statement of the case	2
Reasons for granting the Writ	4
Conclusion	8

APPENDIX

	Page
Decision of the United States District Court for the District of Connecticut	2a
Decision of the United States Circuit Court of Appeals for the Second Circuit	26a

CASES CITED *Page*

Alyeska Pipeline Service Co. v. The Wilderness Society, Et Al, 43 L.W. 4561 7

Brandenburger v. Thompson, 494 F.2d 885 7

Class v. Norton, 505 F.2d 123 7

Commonwealth of Massachusetts Board of Retirement v. Murgia, Dkt. No. 74-1120 7

Dawkins v. Craig, 483 F.2d 1191 5

Dugan v. Rank, 372 U.S. 609 5

Edelman v. Jordan, 415 U.S. 651 6

Gates v. Collier, 489 F.2d 298, petition for hearing en banc granted, 500 F.2d 1382 7

Harrison Construction Co. v. Ohio Turnpike Com'n., 272 F.2d 337 5

Jordan v. Fusari, 496 F.2d 646 7

Jordan v. Gilligan, 500 F.2d 701 4

Land v. Dollar, 330 U.S. 731 5

Named Individual Members of The San Antonio Conservation Society, Et Al v. Texas Highway Department, 496 F.2d 1017 ..... 5, 7

Sims v. Amos, 340 F.Supp. 691 aff'd summarily, 409 U.S. 942 7

Skehan v. Board of Trustees of Bloomsburg State College, 501 F.2d 31 ..... 6, 7

Souza v. Travisono, ____ F.2d ____ (CA1 1975) 7

Taylor v. Perini, 503 F.2d 899 ..... 5, 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. _____

FREDERICK BITZER, Chairman of the State Employees' Retirement Commission, ROBERT I. BERDON, Treasurer of the State of Connecticut, and NATHAN G. AGOSTINELLI, Comptroller of the State of Connecticut,

Petitioners,

v.

DONALD MATTHEWS, MORTIMER COVERT,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioners, Frederick Bitzer, Chairman of the State Employees' Retirement Commission, Robert I. Berdon, Treasurer of the State of Connecticut and Nathan G. Agostinelli, Comptroller of the State of Connecticut, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on June 2, 1975.

OPINION BELOW

The opinion of the District Court of September 16, 1974 is reported in 390 F. Supp. 278 (D. Conn. 1974), and also appears in the Appendix hereto.

[redacted]. The opinion of the Court of Appeals, not yet reported, also appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on June 2, 1975 and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Does the eleventh Amendment to the Constitution of the United States of America prohibit the award of attorneys' fees against the Defendants, Chairman of the State Employees' Retirement Commission, Treasurer of the State and Comptroller of the State, since these fees are to be paid out of the State Treasury?

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT XI

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by the Citizens of another state or by Citizens or Subjects of any Foreign State.

STATEMENT OF THE CASE

The Connecticut State Employees' Retirement Act grants to women employees having 25 or more years of state service the right to retire with pension rights five years earlier than men with identical service qualifications; so that women may retire at age 50, while men are not permitted to retire until age 55. The Retirement Act also contains provisions described as discriminatory rate differentials which favor female employees over male employees, who have worked less than 25 years. These laws authorize reduced retirement benefits to

employees who separate from state employment before they are normally eligible to retire, based upon the aforesaid preferred age differentials.

This suit was instituted as a class action in behalf of all "male" state employees or former state employees who were members of the Connecticut State Employees' Retirement system. The suit not only asserted equal protection claims under the Fourteenth Amendment to the Constitution of the United States, but also asserted statutory violations under the Civil Rights Act of 1871, 42 U.S.C. § 1983. The plaintiffs sought both declaratory and injunctive relief. A three-judge court was convened to hear the case pursuant to 28 U.S.C. §§ 2281 and 2284. On October 15, 1973, plaintiffs amended their complaint to add a count alleging that the Retirement Act violated Title VII of the 1964 Civil Rights Act, 42 U.S.C. §§ 2000e, et seq. Title VII originally did not apply to state governments, but had been amended effective March 24, 1972 to include the state governments within its scope. The case was then remanded to Chief Judge Clarie, sitting as a single district judge for resolution of the claims pursuant to 28 U.S.C. § 2281. Judge Clarie determined that the State Employees' Retirement Act violates Title VII insofar as it discriminates in favor of women in the computation of retirement benefits. The defendants did not appeal from the District Court's ruling that the Retirement Act violates Title VII. Neither did the defendants appeal from the order which prohibited future payments from the Retirement Fund or from other state monies under the Retirement System in a manner which would discriminate against men on the basis of sex. The plaintiffs had also sought to have the retirement benefits for all living retired male employees recalculated retroactively and had also claimed attorneys' fees and costs. Chief Judge Clarie held that the Eleventh Amendment to the Constitution of the United States barred a retroactive money judgment that would be paid by state funds. He also declined to grant

attorneys' fees and costs. The plaintiffs appealed from Judge Clarie's ruling. The United States Court of Appeals for the Second Circuit upheld Chief Judge Clarie's rulings that the district court could not grant retroactive damages against the State of Connecticut, but that the district court could grant prospective injunctive relief against state officers. The Court of Appeals differed with Chief Judge Clarie's ruling on attorneys' fees and remanded "the case to the district court for the purpose of determining in its sound discretion whether an award of attorneys' fees is appropriate and, if so, the amount that may reasonably be awarded."

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS

The United States Court of Appeals for the Second Circuit in deciding the case now before you stated that in *Class* v. *Norton* 505 F.2d 123 (2d Cir. 1974) it had held that the assessment of costs and attorneys fees was merely a permissible ancillary effect on the State Treasury and that this was necessary in order to invoke the Court's power to enjoin the future illegal conduct. The Court stated that its decision was to adhere to *Class* and specifically stated that it decined to join the Third, Fifth and Sixth Circuits in denying the payment of attorney's fees as being prohibited by the Eleventh Amendment.

The United States Court of Appeals for the Sixth Circuit in *Jordan* v. *Gilligan*, 500 F.2d 701, 705 stated:

> ". . . This cause, insofar as the award of attorneys' fees is concerned although nominally against the chief executive and other officials of the State of Ohio, in substance and effect was against the State. Any award of attorneys' fees whether against the State of Ohio or its

officials, vitally affects the rights and interests of the state in preserving its revenues. According to the general rule 'a suit is against the sovereign if the judgment sought would expend itself on the public treasury . . .' *Land* v. *Dollar*, 330 U.S. 731, 738, 67 S.Ct. 1009, 91 L.Ed. 1209 (1947) . . . *Dugan* v. *Rank*, 372 U.S. 609, 620, 83 S.Ct. 999, 1006, 10 L.Ed.2d 15 1963; accord *Dawkins* v. *Craig*, 483 F.2d 1191 (4th Cir. 1973). And as this Court stated in *Harrison Construction Co.* v. *Ohio Turnpike Com'n.* 272 F.2d 337, 340 (6th Cir. 1959), 'When the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants.' . . ."

"Stripped of distracting shadow questions, the case before us presents a singular, although by no means simple issue:

Does a federal court have the power to award attorneys' fees against a state or its officials acting in their official capacities in a suit brought under 42 U.S.C.§1983 to vindicate constitutional rights? To this inquiry we must respond in the negative."

The same court in *Taylor* v. *Perini*, 503 F2d 899 again affirmed the principle that the award of attorney fees by a federal court against the state or state officials is barred by the Eleventh Amendment.

The United States Court of Appeals for the Fifth Circuit also differs with the determination of the Second Circuit. In *Named Individual Members of the San Antonio Conservation Society, et al* v. *Texas Highway Department*, 496 F.2d 10017, 1026 (1974) declared:

"The state defendants respond that sovereign immunity of the State of Texas by virtue of the Eleventh Amend-

> ment to the Constitution has also immunized them from an award of attorneys' fees. The recent case of *Edelman* v. *Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662, decided by the Supreme Court on March 25, 1974 is cited by the state defendants in support of this contention. It is apparent that any award for attorneys' fees must be paid from the general revenues of the State of Texas. Under the *Edelman* rationale 'the rule has evolved that a suit by private parties seeking to impose a liability which must be paid from public funds in the State Treasury is barred by the Eleventh Amendment.' *Edelman*, supra, 415 U.S. at 663, 94 S.Ct. at 1356. Cases in which attorneys' fees were awarded because of bad faith or obdurate obstinacy or under the private attorney general theory against non-state defendants are clearly inapposite. The claim for attorneys' fees, even if limited to services through the first appeal of this case, is, therefore barred."

The United States Court of Appeals for the Third Circuit has also joined the Fifth and Sixth Circuits in upholding the immunity granted state governments by the Eleventh Amendment to the Constitution of the United States of America. The Third Circuit in *Skehan* v. *Board of Trustees of Bloomsburg State College*, 501, F.2d 31 held that an award for attorneys' fees could not be recovered against individual defendants, who were in positions where they exercised such discretionary governmental functions as to entitle them to official immunity.

The necessity that the Supreme Court grant this writ is pointed up by the fact that both the Second Circuit and the Sixth Circuit cite *Edelman* as their authority for arriving at opposite conclusions.

The Supreme Court has indicated at least on two occasions that it does not look with favor upon the awarding of

attorneys' fees where such fees will be paid out of state treasuries. *Commonwealth of Massachusetts Board of Retirement* v. *Murgai*, Dkt. No. 74-1120 and *Alyeska Pipeline Service Co.* v. *The Wilderness Society, et al*, 43 L.W. 4561, 4570, where the Court stated, "Nor should the federal courts purport to adopt on their own initiative a rule awarding attorneys' fees based on the private attorney general approach when such judicial rule will operate only against private parties and not against the Government."

In footnote No. 44 the Court further clarified its position by stating:

> "Although an award against the United States is foreclosed by 28 U.S.C.§2412 in the absence of other statutory authorization, an award against a state government would raise a question with respect to its permissibility under the Eleventh Amendment, a question on which the lower courts are divided. Compare *Souza* v. *Travisono*, ____ F.2d____(CA1 1975); *Class* v. *Norton*, 505 F.2d 123 (CA2 1974); *Jordan* v. *Fusari*, 496 F.2d 646 (CA2 1974); *Gates* v. *Collier*, 489 F.2d 298 (CA5 1973), petition for rehearing en banc granted, 500 F.2d 1382 (CA5 1974); *Brandenburger* v. *Thompson*, 494 F.2d 885 (CA9 1974); *Sims* v. *Amos*, 340 F.Supp. 691 (MD Ala.), aff'd. summarily, 409 U.S.942 (1972); with *Jordan* v. *Gilligan*, 500 F.24 701 (CA6 1974); *Taylor* v. *Perini*, 503 F.2d 899 (CA6 1974); *Named Individual Members* v. *Texas Highway Dept.*, 496 F.2d 1017 (CA5 1974); *Skehan* v. *Trustees of Bloomsberg State College*, 501 F.2d 31 (CA3 1974). In this case, the Court of Appeals did not rely upon the Eleventh Amendment in declining to award fees against Alaska, see n. 16, *supra*, and therefore we have no occasion to address this question."

CONCLUSION

These conflicts justify the grant of certiorari to review the judgment below.

Respectfully submitted,

CARL R. AJELLO
Attorney General of Connecticut

SIDNEY D. GIBER
BERNARD F. MCGOVERN, JR.
Assistant Attorneys General
30 Trinity Street
Hartford, Connecticut

August 11, 1975

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No.

FREDERICK BITZER, Chairman of the State Employees' Retirement Commission, ROBERT I. BERDON, Treasurer of the State of Connecticut, and NATHAN G. AGOSTINELLI, Comptroller of the State of Connecticut,

Petitioners,

v.

DONALD MATTHEWS, MORTIMER COVERT,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

GARLAND M. FITZPATRICK, SAUL STEIN, WILLIAM SLOCUM, THOMAS H. ELLIOTT, DONALD MATHEWS & MORTIMER COVERT

v.

J. FREDERICK BITZER, Chairman of the State Employees' Retirement Commission, ROBERT I. BERDON, Treasurer of the State of Connecticut, & NATHAN G. AGOSTINELLI, Comptroller of the State of Connecticut

Civil No. 15,492

MEMORANDUM OF DECISION

This suit was brought as a class action by the named plaintiffs, in behalf of all "male" state employees or former state empoyees, who were members of the State Employees' Retirement System, under Chapter 66 of the Connecticut General Statutes. It not only asserted equal protection claims under the Fourteenth Amendment to the Federal Constitution, but also statutory violations under the Civil Rights Act of 1871, 42 U.S.C. § 1983. The plaintiffs request the Court to grant both declaratory and injunctive relief against the Chairman of the State Employees' Retirement Commission, the State Treasurer and the State Comptroller, to prevent their alleged continued administration of what is claimed to be unlawful sexually discriminatory retirement provisions of the Connecticut State Employees' Retirement Act and more particularly § 5-162, § 5-163, and § 5-166 of the Connecticut General Statutes.

Jurisdiction of this suit exists under 28 U.S.C. §§ 1331, 1343(3) and (4), 2201, 2202, and 2281; and the action is specifically authorized under Title VII of the Civil Rights Act,

as amended, 42 U.S.C. § 2000e-5(f)(3). Since injunctive relief restraining the enforcement of certain state statutes was requested, a three-judge constitutional court was convened, under 28 U.S.C. §§ 2281 and 2284. A hearing on the merits, scheduled before the three-judge court on April 27, 1973, was postponed at the request of plaintiffs' counsel, because at that time the General Assembly was reported to be favorably considering legislation, which would make this case moot. The plaintiffs thereafter amended their complaint on October 15, 1973, by adding a second count, alleging that the State Retirement Act, on its face and as applied, violates Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e *et seq.*, and more specifically Public Law No. 92-261, effective March 24, 1972. The plaintiffs also represented that this state law clearly violates the interpretive guidelines relating to pension fringe benefits as promulgated under 29 C.F.R. 1604.9 and 37 C.F.R. 6835[1] by the Equal Employment Opportunities Commission, revised April 5, 1972.

The State Employees' Retirement Act grants to women employees having 25 or more years of state service, the right to retire with pension rights five years earlier than men with identical service qualifications; so that women may retire at age 50, while men are not permitted to retire until five years later, at age 55. The Act also contains provisions described as discriminatory rate differentials in favor of female employees over male employees, who have worked less than 25 years in the state service. These laws authorize reduced retirement benefits to employees, who separate from state employment before they are normally eligible to retire, based upon the aforesaid preferred age differentials.

After a full hearing on the merits, the Court finds that the State Employees' Retirement Act does violate Title VII of the Civil Rights Act of 1964, as amended, and the regulations appurtenant thereto, in that it invidiously discriminates

in favor of women over men, as to the number of years of service eligibility and the computation of retirement benefits. The Court accordingly grants judgment for the plaintiffs on their prayer for equitable relief.

SUBJECT BACKGROUND

This suit is sponsored by the Connecticut State Employees' Association, a non-profit organization, whose purpose primarily is to protect and promote the interests of all state employees. The parties stipulated in writing that the Association and its membership have approved the bringing of this action and that its news publication has in the past, and will in the future, apprise its members of its progress. They have also agreed that it is a true class action, and that the male plaintiffs are not in any way different from, unique, or not representative of other similarly situated male state employees, insofar as their retirement benefits and those of comparably situated female state employees are concerned.[2]

The State Employees' Association itself agreed to pay the court costs required for the bringing of this action, while the Connecticut Civil Liberties Union agreed to assume the responsibility for providing cooperating legal counsel at no expense to the plaintiffs. All of the plaintiffs are *male* state employees; four of them are currently employed and two are retired. Both of the aforesaid employee categories are comprised of participating members in the Connecticut State Employees' Retirement Fund. Three of the active employees have worked more than 25 years and desire to retire before reaching 55 years of age; the fourth has served more than 10 years, but less than 25 years and wishes to retire in the near future.

The plaintiffs' complaint as originally drawn, attacked the constitutionality of several sections of the State Retirement Act and requested that their enforcement be enjoined,

insofar as the statutes related to the disparate treatment of retirement provisions and premised these claims on alleged violations of equal protection rights under the Federal Constitution. The Federal Equal Employment Opportunity Act was amended by Public Law No. 92-261, 86 Stat. 103, on March 24, 1972, so as to encompass state and local governments under its definition of the terms, "person, employer and employee," 42 U.S.C. § 2000e(a),(b), and (f). This change made it encumbent upon state and local governments to immediately reappraise their employment practices, to be certain that they conformed with the amended federal law and its supporting regulations. After the commencement of this action on December 11, 1972, the plaintiffs, in January, 1973, filed a class complaint with the Boston Regional Office of the Equal Employment Opportunity Commission of discrimination charges against the Connecticut State Employees' Retirement Commission. On September 14, 1973, that office issued to the plaintiffs a right to sue letter as the latter had requested. The Equal Employment Opportunity Act amendment made it obvious to the three-judge court, that the application of the new law might well prove dispositive of the issues. For that reason, the Court remanded the case to the single district judge who convened it, so that he might consider the applicability of federal statutory law and thus dispose of the case on those grounds, without reaching the constitutional issues. It is now a well established principle of law that even "a three-judge court . . . [is] obliged to adjudicate [a] statutory claim in preference to deciding the original constitutional claim . . . ." *Rosado* v. *Wyman*, 397 U.S. 397, 402 (1970); *see* also *Wyman* v. *Rothstein*, 398 U.S. 275 (1970); *King* v. *Smith*, 392 U.S. 309 (1968), and *Swift & Co.* v. *Wickham*, 382 U.S. 111 (1965).

Written stipulations of fact were executed by counsel; the first was filed November 30, 1973, and the supplement was filed February 6, 1974. Procedurally, counsel agreed

therein that the amendment which added the second count, filed March 29, 1974,

> "(a) . . . be treated as valid when originally filed or may be revalidated as of the date of the filing of this stipulation, (b) that it is not necessary for plaintiffs to file a new amendment at this time or commence a new civil action, and (c) that the Amendment already on file should be considered the civil action commenced by said plaintiffs, as authorized by the Attorney General in such letter [right to sue letter] of January 16, 1974."[3]

The plaintiffs' complaint alleged that the following provisions of the State Retirement Act constituted an invidious discrimination against male employees:

(a) Connecticut General Statute § 5-162, and more particularly:

> "(i) Subsection (c)(1) which provides for the retirement of a member with 25 or more years of state service on or after the member's fifty-fifth birthday, if a man, or fiftieth birthday, if a woman."
>
> "(ii) Subsection (d)(1) which provides for the retirement of a member with less than 25 years of state service if he meets the following conditions:
>
> "(A) The member is a woman who has completed five years of state service and reached her sixty-fifth birthday;
>
> "(B) The member is a woman who has completed ten years of state service and reached her fifty-fifth birthday;
>
> "(C) The member is a man who has completed ten years of state service and reached his sixtieth birthday;'

and subsection (d)(3) in which retirement income is computed on the basis of a table based on age and sex under which in effect a man must be five years older than a woman to receive equivalent benefits.

"(b) Connecticut General Statutes 5-163 on early retirement, especially subsection 3, wherein a member 'after he has completed twenty-five years of state service but before he has reached his fifty-fifth birthday, if a man, or her fiftieth birthday, if a woman, shall be entitled to a retirement income.'"

"(c) Connecticut General Statute 5-166(a) which provides that a member who leaves state service before becoming eligible for retirement shall, under certain conditions, be eligible for retirement income on a reduced actuarial basis 'provided, if such member is a woman she shall be eligible upon reaching her fiftieth birthday and if a man, he shall be eligible upon reaching his fifty-fifth birthday."

The plaintiffs' complaint alleged that the foregoing provisions of state law, on their face and as applied by the defendants, violate Title VII of the Civil Rights Act of 1964, as amended, and the regulations adopted pursuant thereto, because they discriminate between men and women in regard to fringe benefits of employment.[4] They also represented that these provisions violate the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States and the Federal Civil Rights Act of 1871, because they discriminate on the basis of sex as a condition or privilege of employment, so as to deprive the plaintiffs and those similarly situated of their rights, privileges, and immunities secured under said Constitution.

STATUTORY HISTORY

Counsel for both parties have failed to bring to the Court's attention, any legislative history which might more fully explain the reasons why the General Assembly wrote into law this retirement age priority for the benefit of women. However, the Court is mindful that many private pension systems at that time contained similar provisions, which gave a preferred status to female employees. Historically, this is understandable when we read an 1872 decision of the United States Supreme Court, which considered women to have been ordained bythe Creator to be the more dependent of the sexes and entitled to be sheltered from the rebuffs of life. That decision concluded that the State of Illinois in refusing to grant a license to a woman to practice law, had violated no provision of the Federal Constitution and explained its reasoning as follows:

> "Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband . . . .
>
> "The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator." *Bradwell* v. *The State*, (Illinois), 83 U.S. (16 Wall.) 130, 141 (Dec. 1872).

That protective era has now passed. A new order prevails today where men and women stand side by side in the work force, performing like skills as equals in all occupational endeavors. It is only right that both sexes should be treated as equals in sharing the benefits of their productive efforts towards a better life.

The historical record of the present legislative act reveals that H.B. No. 117, was signed into law on May 8, 1919, and provided in relevant part:

> "*Any person* who shall have been in the service of the State thirty years and shall have reached the age of sixty-five years, or any person who has served in any department of the State twenty-five or more years in the aggregate and has reached the age of seventy, may be retired by the board of control, and thereafter shall receive a salary equal to one-half his average salary for the five years next preceding such retirement . . . ."

It is of special interest to note that the first State Retirement Act provided for no preferred status, to any employee because of his or her gender; the granting of retirement was not then regarded as a right to be demanded by the employee, but a matter of discretion which rested solely with the State, and determined by the Board of Finance and Control. The term "employee" was classified as being "any person" and this description was carried throughout the 1930 revision, as provided in Conn. Gen. Stat. § 170.

It was not until 1939 that the amended law, § 67(e), introduced the preferred retirement status for women. It provided in relevant part as follows:

> ". . . or being a female person, having reached the age of fifty, or being a male person, having reached the age of fifty-five . . . ."

> "*Any person* in the service of the state in an appointive position covered by this part, who, being a female person shall reach the age of sixty-five years, or being a male person shall reach the age of seventy years, shall be retired . . . ."

This disparate treatment of eligibility for retirement was first built into the law in the 1939 Session and continues down to the present; it is more particularly embodied in the specific statutes now being challenged, Conn. Gen. Stat. §§ 5-162, 5-163, and 5-166.

An exception to the foregoing age retirement rules, applies to state policemen and correctional institution guards and instructors, who are permitted to retire on their own application or that of their Commissioner after 20 years of service and upon reaching their forty-seventh birthday. It is also of interest to note that § 29-3 defines the term policeman to include policewoman; so that there exists no age disparity under the retirement laws affecting members of the State Police Department.

Statistical Facts Relevant to Plaintiffs' Status

The parties have stipulated that as of July 31, 1973, the relevant factual findings pertaining to the administration of the state retirement laws as they apply to the plainiffs are as follows:

Plaintiff	Age	State Employment	Total Qualifying time for benefits	Normal Ret. Date or Rate	Normal Ret. Date if Woman
Fitzpatrick	53	9- 1-49 to date	29 yrs. 4 mos.	2-1-75	2-1-70
Stein	54	4-16-41	32 yrs. 3 mos.	8-1-73	8-1-68
Slocum	51	11-17-41	31 yrs. 8 mos.	11-1-76	11-1-71

Plaintiff	Age	State Employment	Total Qualifying time for benefits	Normal Ret. Date or Rate	Normal Ret. Date if Woman
Elliot	52	Army Service 12- 7-41- 6-19-42 5-12-49- 7-26-50 1- 3-61 to date	14 yrs. 4 mos.	5-1-84	5-1-81
Mathews	67	4-15-47- 10-31-71	24 yrs. 8 mos.	923.10 monthly	935.63
Covert	64	6-14-26- 9-24-26 12-20-26- 9-23-27 6- 4-28- 6-4-28- 9-21-28 3- 1-49- 7-25-50 11- 3-58- 5-31-72	monthly 305.74	328.66	16 yrs. 5 mos.

The plaintiffs, Fitzpatrick, Stein, Slocum and Elliot, have expressed a desire to retire in the immediate future, but find they are ineligible to do so. However, if each were a female, he would have been eligible to have retired at age 50, at the following respective monthly benefits: $1,149.53; $1,043.27; $483.70, and $171.50.

The *normal retirement* rate schedule for *males* is when the benefit rate is 2% or more; 25 years or more of service at age 55; 10 years, but less than 25 at age 65; 5 years but less than 10 at age 70. In comparison, the normal retirement age for a woman is when the benefit rate is 2% or more; 25 years or more of service at age 50; 10 years and less than 25 years at age 60; 5 years, but less than 10 at age 65.

The benefit rate schedule for early retirement provides monthly benefits equal to 1/12 of rate, multiplied by the years of service, times the average of the three highest years of earnings. The variant in the male and female retirement is ex-

pressed in the rate table prescribed in § 5-162(d)(3) of the Connecticut General Statutes. That rate is determined by the years of service and the employee's age at retirement and is more specifically portrayed in the booklet "Connecticut State Employees' Retirement System, January 1972," attached to the filed stipulation as an appendix.

The monthly benefits calculated for each of the plaintiff-employees already retired, disclose a variance in monthly retirement benefits on the basis of sex. The benefits of the plaintiff Mathews are computed in the following manner: 1/12 (.02 x 24-8/12 x $22,455.30) equaling a monthly payment of $923.10; whereas, a comparable female employee's benefits would be computed by the formula: 1/12 (.025 x 20 x $22,455.30) amounting to a monthly retirement benefit of $935.63. Similarly, the plaintiff Covert's calculation of monthly benefits would be: 1/12 (.0186 x 16-5/12 years x $12,013.36) amounting to monthly benefits of $305.74; whereas, a comparable female employee's benefits would be 1/12 (.02 x 16-5/12 years x $12,013.36) amounting to a monthly payment of $328.66. The parties have agreed that retirement benefits under the State Retirement Act may be properly described as "fringe benefits" within the meaning of Title VII of the Federal Civil Rights Act of 1964 and the EEOC Code of Regulations.

Claims of the Parties

The plaintiffs direct their claims against the challenged state laws on federal statutory grounds aided by the supporting power of the most recent amendment to Title VII of the Equal Employment Opportunity Act, Public Law No. 92-261, effective March 24, 1972. Title 42 U.S.C. § 2000e defines an employer as a "person" engaged in an industry affecting commerce, who employs fifteen or more employees for a minimal stated period of time; and it defines the term "person" to in-

clude "state governments, governmental agencies, (and) political subdivisions." Thus, all state employees have now been brought by Congress under the protection of 42 U.S.C. § 2000e(2)(a). That federal law now makes it an "unlawful employment practice" for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . . ." Title 42 U.S.C. § 2000e-5(f)(1) authorizes any aggrieved person to bring an action against his employer, if his grievance has not been resolved within 180 days after he has filed his complaint with the Equal Employment Opportunity Commission. The parties stipulated that all of the statutory prerequisites have been fully complied with here, so that the issues are properly before the Court. The secondary attack on discriminatory sex classifications in the state's retirement laws, addresses itself to the claim that these differences are unreasonable and arbitrary and do not have any fair or meaningful relation to the object of the legislation.

The defendants have baldly denied that the retirement laws impose any invidious discrimination on the basis of sex, so as to deprive the plaintiffs or those identifiable with their class, of equal protection under the federal constitution or the provisions of the Equal Employment Opportunity Act. 42 U.S.C. § 2000e-2(a)(2). They also assert that this suit is in reality a suit against the State of Connecticut and as such is barred by the Eleventh Amendment to the Federal Constitution. On the discrimination issue, the Attorney General has argued that it is common knowledge, that women as a class, earn less than men; and that employment in governmental agencies, generally pays less than similar positions in private industry. He suggests that when the General Assembly originally established the retirement plan, it offered these preferred inducements to women, so that they would seek state employment, even though the wages were less than those

paid in the private sector. The defendants would justify their position on this issue based upon the holding of the Second Circuit in *Gruenwald* v. *Gardner,* 390 F.2d 591, 592 (2d Cir. 1968), *cert denied sub nom Gruenwald* v. *Cohen,* 393 U.S. 982 (1968). In that case, the Court approved as being constitutional, a disparity in the computation of federal social security retirement benefits, where men and women had equal earnings, but based its finding upon the recognized differences in the attributes of men and women. The defendants claim that case determined not only the constitutional validity of the defendants' present posture, but that dicta supported the proposition that the State was not violating the Civil Rights Act of 1964. The case clearly held that different treatment for women, as a class, was constitutionally permissible, so long as the discrimination was not patently arbitrary and was reasonably related to its subject and societal interests.

Discussion of Law

There exists no threshold jurisdictional barrier to the Court's disposition of this case. While it is now a commonly accepted principle that the Eleventh Amendment to the Constitution will bar a suit for money damages in federal court against an unconsenting state, jurisdiction was recognized in *Ex parte Young,* 209 U.S. 123 (1908), to enjoin the acts of state officials, when they were sued individually and the complaint alleged that they were acting unconstitutionally or contrary to a federal law. Certainly, any determination that a state statute is void for obstructing a federal statute rests on the Supremacy Clause of the Federal Constitution.[5]

This principle has been reaffirmed in *Scheuer* v. *Rhodes,* 42 U.S.L.W. 4543 (U.S. April 17, 1974) when the Court said:

> "The Eleventh Amendment to the Constitution of the United States provides: 'The judicial power of the United

> States shall not be construed to extend to any suit in law and equity, commenced or prosecuted against one of the United States by citizens of another State . . . .' It is well established that the Amendment bars suit not only against the State when it is the named party but when it is the party in fact." . . . .
>
> . . . .
>
> "However, since *Ex parte Young [supra]* it has been settled that the Eleventh Amendment provides no shield for a state official confronted by a claim that he had deprived another of a federal right under the color of state law." 42 U.S.L.W. at 4544-45.

Congress proclaimed by law on March 24, 1972, that the federal right to equal opportunity in employment should be extended to include employees working for state and local governments. 42 U.S.C. § 2000e-2. State governments were charged with the duty to reformulate their thinking in this area and to avoid committing "unlawful employment practices," if such existed.

> "Where employees in state institutions not conducted for profit have such a relation to interstate commerce that national policy, of which Congress is the keeper, indicates that their status should be raised, Congress can act. And when Congress does act, it may place new or even enormous fiscal burdens on the States." *Employees* v. *Missouri Public Health Dept.*, 411 U.S. 279, 284 (1974).

Under subchapter VI, § 2000e, *Definitions,* the law defines the statutory terms as follows:

> "(a) The term 'person' includes one or more individuals, governments, governmental agencies, political subdivisions . . . ."

"(b) The term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year . . . ."

. . . .

"(f) The term 'employee' means an individual employed by an employer, except that the term 'employee' shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. *The exemption set forth in th preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision.*" (emphasis added).

Clearly, the law requires that all state employees, except those specifically exempted (such as those elected to public office or their personal or policy staff of advisers) are subject to and protected by the discrimination prohibitions of the federal law.[6]

Section 2000e-2 provides:

"(a) It shall be an unlawful employment practice for an employer —

. . . .

"(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment

opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin."

Supportive of the foregoing amendment, the Equal Employment Opportunities Commission on April 5, 1972, revised its "Guidelines on Discrimination Because of Sex" which provide in relevant part:

"Fringe Benefits:

(a) 'Fringe benefits,' as used herein, includes medical, hospital, accident, life insurance and retirement benefits; profit sharing and bonus plans; leave; and other terms, conditions, and privileges of employment.

(b) It shall be unlawful employment practice for an employer to discriminate between men and women with regard to fringe benefits.

• • • •

(e) It shall not be a defense under Title VII to a charge of sex discrimination in benefits, that the cost of such benefits is greater with respect to one sex than the other.

(f) It shall be an unlawful employment practice for an employer to have a pension or retirement plan which establishes different optional or compulsory retirement ages based on sex or which differentiates in benefits on the basis of sex." 29 C.F.R. 1604.9 (1972).

The Court is required to look with great deference to these administrative interpretive guidelines established by the very agency charged with administering this law.

"The Equal Employment Opportunity Commission, having enforcement responsibility, has issued guidelines in-

terpreting § 703(h) to permit only the use of job-related tests. The administrative interpretation of the Act by the enforcing agency is entitled to great deference. See, *e.g. United States* v. *City of Chicago*, 400 U.S. 8 (1970); *Udall* v. *Tallman*, 380 U.S. 1 (1965); *Power Reactor Co.* v. *Electricians*, 367 U.S. 396 (1961). Since the Act and its legislative history support the Commission's construction, this affords good reason to treat the guidelines as expressing the will of Congress." *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433-434 (1971).

The amended federal statute and these supporting guideline regulations make it obvious to the Court, that the Connecticut State Employees' Retirement Act treats men and women according to different benefit standards, in determining their retirement age and pension benefits. The Connecticut plan as presently written, strikes at the very principle, which the federal law prohibits, the disparate treatment of men and women employees, because of their gender.

. . . .

The Seventh Circuit Court of Appeals defined its interpretation of this law without equivocation, when it said:

". . . we read Title VII to include retirement plans as 'conditions of employment' just as they are similarly viewed under the National Labor Relations Act. *Inland Steel Co.* v. *N.L.R.B.* (170 F.2d 247, 7 Cir. 1948, *cert. den.* 336 U.S. 960, 69 S.Ct. 887, 93 L.Ed. 112). Title VII forbids any discrimination with respect to such conditions of employment. Furthermore, the Act proscribes classifications by employees '. . . which would tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . sex . . . .' Section 703(a)(2) [42 U.S.C. § 2000e-2(a)(2)]." *Bartmess* v. *Drewrys U.S.A., Inc.*, 444 F.2d 1186, 1189 (7th Cir. 1971).

The same interpretation of Title VII was followed in *Ugiansky* v. *Flynn and Emrich Company*, 337 F.Supp. 807, 810 (D. Md. 1972) where the Court said:

> "This court believes that pension plans, absent a specific exclusion in the Act, are or may be part of the 'compensation, terms, conditions, or privileges' of employment and therefore covered by Title VII, 42 U.S.C. § 2000e-2(a)(1)."

The Supreme Court had outlawed discrimination as to sex as an overall practice when it decided *Philips* v. *Martin Marietta Corp.*, 400 U.S. 542, 544 (1970) and stated that under the Civil Rights Act of 1964, persons of like qualifications must be given employment opportunities irrespective of their sex.

A plain reading of the present statute teaches us that retirement plans which treat men and women differently with respect to their ages of retirement are prohibited. The Fifth Circuit Court of Appeals unanimously confirmed this principle in *Peters* v. *Missouri-Pacific Railroad Co.*, 483 F.2d 490, 492 n.3, (5th Cir. 1973) (en banc).

> "We entertain no doubt that Congress intended Title VII to reach retirement plans as conditions of employment, just as such plans are viewed as employment conditions under the National Labor Relations Act . . .
>
> "Retirement plans establishing different ages for retirement of male and female employees of one employer violate Title VII."

In a similar vein, the Seventh Circuit said:

> "The scope of Section 703(a)(1) is not confined to explicit discriminations based 'solely' on sex. In for-

> bidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." . . . . *Sprogis* v. *United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971). (footnote omitted).

The Connecticut retirement plan constitutes an unlawful employment practice, because it discriminates between men and women with regard to employment fringe benefits and is therefore found by the Court to be illegal and in violation of federal statutory law.

Remedies

The complaint asks that the Court, in addition to granting injunctive relief against continued prospective violations of the law, should assess money damages retroactively to July 2, 1965, when Title VII of the Civil Rights Act became law. An alternative proposal would award retroactive benefits to January 25, 1971, a date two years prior to the January 25, 1973 date when the plaintiffs first filed their complaint with the Equal Employment Opportunities Commission. They argue that they are entitled to the enforcement of the two-year back pay statute of limitations, 42 U.S.C. § 2000e-5(g), restricting the recovery of retroactive claims under the Act. The plaintiffs insist however, that in any event, they should at least receive benefits recalculated back to March 24, 1972, when the protective policy of the amendment as expressed in Title VII, was extended to include all employees in state government. They press their claim, that they are entitled to be reimbursed back to the time when the federal law first proclaimed as a national policy, that this type of discrimination must end; and only if the Court orders such restitution with their past benefits recomputed, can all victimized male employees be made financially whole.

The plaintiffs have also asked that this Court allow them a sum for reasonable attorneys' fees, under 42 U.S.C. § 2000e-5(k). They agree that the Court's granting of such a request is solely discretionary. The plaintiffs' counsel argues that this litigation is of sufficient public importance to justify the granting of such fees as part of the court costs to the prevailing party.

The total hours of legal preparation as a cooperating attorney for the American Civil Liberties Union amounted to 137.5 hours. A portion of this, 84.9 hours ($4,245.00) is attributable to the work of Attorney Orth, the chief counsel; 22.6 hours to his associate, Attorney Carey ($1,130.00); and 30 hours to a second associate, Attorney Priestly ($900.00). The affidavit submitted by the plaintiffs asserts that the reasonable charges for the legal services of the principals in his firm is billed at the rate of $50 per hour, while that of the associates is $30 per hour. The Court finds that while the counsel fees requested are fair and reasonable in amount, they are not allowable as a recoverable expense against the State.

Law Re: Damages

The State Retirement Fund, § 5-156, provides for a separate trust fund into which is deposited employee contributions and state appropriations, which are held in the custody of the State Treasurer. These funded assets comprise employee contributions, varying in amount from 2% to 5% of the salary, which percentage in turn is dependent upon whether or not the employee has elected social security coverage. The Retirement Commission is entrusted with the task of determining the State's contribution as computed on an actuarial basis, to meet the current benefit services, provided that State payments shall not be less than seventy-five per cent of total retirement income payments for each fiscal

year commencing July 1, 1973. In 1972, pursuant to § 5-156(a), the General Assembly programmed a prospective forty-year amortization of unfunded past service liabilities, varying from 30% in 1971 to 100% in 1985. The major source of these funds is public funds and any deficiency must come from tax revenue. Any judicial determination of the plaintiffs' claims must recognize that any judgment, which would allow retroactive payments would have to come from the public treasury.

> ". . . [W]hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants." *Ford Co.* v. *Dept. of Treasury*, 323 U.S. 459, 464 (1945).

> "Although the Eleventh Amendment is not literally applicable since petitioners who brought suit are citizens of Missouri, it is established that an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another State." *Employees* v. *Missouri Public Health Dept.*, 411 U.S. 279, 280 (1972).

The rule has evolved that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment. *Great Northern Life Ins. Co.* v. *Read*, 322 U.S. 47 (1944); *Kennecott Copper Corp.* v. *Tax Commissioner*, 327 U.S. 573 (1946).

The issue of recovering money damages against a state was clearly resolved in the recent case of *Edelman* v. *Jordan*, 42 U.S.L.W. 4419 (U.S. March 25, 1974) where the United States Supreme Court held that the federal court was without jurisdiction to award a retroactive money judgment, in the absence of a waiver or without the State's consent, when

such would have to be satisfied out of the general revenues of the State; and that this principle was applicable even though the award attempted to make equitable restitution of moneys previously illegally withheld. The plaintiffs here do not suggest that the State has waived the immunity provisions of the Eleventh Amendment. This amendment, therefore, still remains a jurisdictional barrier to the payment of the retroactive monetary relief requested.

In a similar application the Eleventh Amendment precludes the award of attorneys' fees. The State of Connecticut is an alter ego of the defendant Commission members and they have not waived the State's sovereign immunity defense. The award of attorneys' fees from state funds is tantamount to an award of money damages. While the amount sought in this case is not prohibitive, once the flood-gates are opened, adequate control no longer prevails. Statutory authority cannot be permitted to frustrate or pierce the Eleventh Amendment constitutional shield.

> ". . . where a state has not waived its sovereign immunity the Eleventh Amendment bars a district court from awarding attorneys' fees against it." *Jordan* v. *Gilligan*, 42 U.S.L.W. 2590 (6th Cir. April 25, 1974); *cf. Gates* v. *Collier*, 489 F.2d 298 (1973).

See also, *Jordan* v. *Fusari*, 496 F.2d 646, 651 (2nd Cir. 1974), where the Court found the State of Connecticut, in a different case, had waived the Eleventh Amendment, by its conduct in previously settling claims for back unemployment compensation benefits.

The Court finds no reason to discuss the applicability of the Equal Protection Clause of the Fourteenth Amendment, as it relates to discrimination because of sex. *Reed* v. *Reed*, 404 U.S. 71 (1971); *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972); and *Frontiero* v. *Richard*, 411 U.S. 677 (1973). The federal

civil rights statute has adequately determined the issues raised.

The Court finds this to be a class action and that the plaintiffs are entitled to prospective injunctive relief from this date forward, so as to prevent the defendants and their successors from paying out moneys from the retirement fund or state moneys in respect to said fund, which discriminates against men on the basis of sex. The defendants are accordingly ordered to administer the State Employees' Retirement Act without unreasonable sex classifications unfavorable to men as they relate to retirement age and benefit computations; so that men will be eligible to retire at age 50 and receive the same treatment as similarly situated women. Nothing herein shall be construed to interfere with the State Legislature performing its constitutional function of freely determining public policy, as it pertains to deciding upon a uniform retirement age for all men and women employees of the State of Connecticut in the future, provided the same is carried out without discrimination as to age or benefits on the basis of sex.

The foregoing opinion shall constitute the findings of fact and conclusions of law required to be filed by the Court, pursuant to Rule 52(a), Fed. R. Civ. P.

The parties shall settle an appropriate order within ten (10) days. SO ORDERED.

Dated at Hartford, Connecticut, this 16th day of September, 1974.

T. EMMET CLARIE
Chief Judge

FOOTNOTES

[1]See Discussion of Law at p. 19-22.

[2]Stipulation of Facts, filed Nov. 30, 1973.

[3]Supplemental Stipulation of Facts, filed Feb. 6, 1974 (Plaintiffs' Exhibit B).

[4]42 U.S.C. § 2000e *et seq;* 29 C.F.R. § 1604.9 (1972).

[5]Article VI. Cl. 2 provides:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or laws of any State to the Contrary notwithstanding."

> "The Constitution is as imperative in its prohibition of discrimination in state and local government employment as it is in barring discrimination in Federal jobs. The courts have consistently held that discrimination by state and local governments, including job discrimination, violates the Fourteenth Amendment and is prohibited. (footnote omitted).

. . . .

> "The Committee feels that it is an injustice to provide employees in the private sector with an administrative forum in which to redress their grievances while at the same time. denying a similar protection to the increasing number of state and local employees." House Report No. 92-238, Vol. 2, U.S. Code, Cong. and Admin. News, p. 2137 at 2153-4 (92nd Cong., 2d Sess. 1972).

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 740 — September Term, 1974.

(Argued March 10, 1975 Decided June 2, 1975.)

Docket No. 74-2581

GARLAND M. FITZPATRICK, SAUL STEIN, WILLIAM SLOCUM, THOMAS H. ELLIOT, DONALD MATHEWS, and MORTIMER COVERT,

Plaintiffs,

DONALD MATTHEWS, MORTIMER COVERT,

Plaintiffs-Appellants,

— against —

FREDERICK BITZER, Chairman of the State Employees' Retirement Commission, ROBERT I. BERDON, Treasurer of the State of Connecticut, and NATHAN G. AGOSTINELLI, Comptroller of the State of Connecticut,

Defendants-Appellees.

Before:

MOORE, MANSFIELD and GURFEIN,

Circuit Judges.

Appeal by plaintiffs, male state employees or former state employees who were members of a retirement plan established by the Connecticut State Employees' Retirement Act, from a decision of the United State District Court for the District of Connecticut, T. Emmet Clairie, *Chief Judge,*

which enjoined enforcement of provisions of the Retirement Act found to discriminate unlawfully on the basis of sex in violation of Title VII of the 1964 Civil Rights Act, 42 U.S.C. §§ 2000e, *et seq.*, as amended, but refused to award retroactive benefits or attorneys' fees to plaintiffs on the ground that the Federal District Court was without jurisdiction to enter such an award under the Eleventh Amendment to the United States Constitution.

Reversed and remanded on the matter of attorneys' fees; in all other respects affirmed.

PAUL W. ORTH, Esq., Hartford, Conn. (Austin Carey, Jr., Esq., Hoppin, Carey & Powell, Hartford, Conn., of counsel), *for Appellants.*

SIDNEY D. GIBER, Assistant Attorney General, Hartford, Conn. (Carl R. Ajello, Attorney General of the State of Connecticut, F. Michael Ahern, Assistant Attorney General, Hartford, Conn., of counsel), *for Appellees.*

WILLIAM A. CAREY, General Counsel, Washington, D.C. (Joseph T. Eddins, Associate General Counsel, Beatrice Rosenberg, Charles L. Reischel, Susan J. Johnson, Attorneys, Equal Employment Opportunity Commission, Washington, D.C., of counsel), *for United States Equal Employment Opportunity Commission as Amicus Curiae.*

MANSFIELD, *Circuit Judge:*

The principal question on this appeal is whether, in a suit against a state by its employees attacking its retirement plan as discriminating on the basis of sex in violation of Title VII of the Civil Rights Act of 1964, the Eleventh Amendment bars a federal court from granting, in addition to injunctive

relief, monetary damages and attorneys' fees. We hold that the state is shielded by Eleventh Amendment against an award of damages but not against an award of attorneys' fees that is ancillary to the permissible grant of prospective injunctive relief.

This litigation was brought by the named plaintiffs as a class action on behalf of all present and retired male employees of the State of Connecticut who were members of the State Employees' Retirement System, a retirement benefit plan established by the State Employees Retirement Act, Conn. Gen. Stat. §§ 5-152 to 5-192 ("Retirement Act" herein). Asserting equal protection claims under the Fourteenth Amendment and statutory violations under 42 U.S.C. § 1983, plaintffs sought declaratory and injunctive relief against the State Treasurer, State Comptroller, and the Chairman of the State Employees' Retirement Commission, to restrain continued enforcement by those officials of sexually discriminatory provisions of the Retirement Act. Plaintiffs objected to §§ 5-162, 5-163 and 5-166, which grant to women employees having 25 or more years of state service the right to retire with pension rights five (5) years earlier than similarly situated men, and further provide rate differentials favoring female over male employees who retire with less than 25 years of state service.

A three-judge court was convened to hear the case, 28 U.S.C. §§ 2281, 2284, but on October 15, 1973, plaintiffs amended their complaint to add a count alleging that the Retirement Act violated Title VII of the 1964 Civil Rights Act, 42 U.S.C. §§ 2000e, *et seq.* Title VII, which originally did not apply to state governments, had been amended by Public Law No. 92-261, 86 Stat. 103, effective March 24, 1972, to bring the states within its purview.[1] After the amendment of the

---

[1]Section 2000e(a) of 42 U.S.C. was amended to provide that a "person" who can be an "employer" under Title VII includes "govern-

complaint, the case was remanded to Chief Judge Clarie, sitting as a single district judge, for resolution of the claims under federal statutory law, see 28 U.S.C. § 2281.[2]

After a hearing on the merits, Chief Judge Clarie, in a thorough opinion, found that retirement benefits fall within the language "compensation, terms, conditions, or privileges of employment" as used in Title VII and that such benefits are barred by Title VII from being made the subject of sex discrimination. 42 U.S.C. § 2000e-2(a)(1). He further deter-

---

ments, governmental agencies [and] political subdivisions."

[2]The three-judge court, in an opinion issued on June 10, 1974, determined that the federal statutory claim was "substantial" and remanded the case. Since an action for injunctive relief against a state statute, which is based on *both* federal constitutional and non-constitutional grounds, as is the present action, must be heard and determined by a three-judge court under 28 U.S.C. § 2281, *Florida Lime & Avocado Growers, Inc.* v. *Jacobsen*, 362 U.S. 73, 76-77 (1960), until recently the propriety of this remand may have been questioned. Since *Florida Lime*, however, the Court has held that a three-judge court need not be convened in an action to enjoin a state statute solely on the ground that it conflicts with a federal statute, *Swift & Co.* v. *Wickham*, 382 U.S. 111 (1965), and that, where a properly convened three-judge court is confronted with a case presenting both constitutional and non-constitutional grounds, it should first adjudicate the non-constitutional claim, *Rosado* v. *Wyman*, 397 U.S. 397, 402 (1970); *King* v. *Smith*, 392 U.S. 309 (1968).

The *Rosado* Court suggested that in that case "the most appropriate course may well have been to remand to the single district judge for findings and determination of the statutory claim," 397 U.S. at 403, and this suggestion seems to have been firmly adopted by the Court in *Hagans* v. *Lavine*, 415 U.S. 528 (1974). In *Hagans* the district court, sitting alone, had determined the substantiality of the constitutional claims but then proceeded to consider on the merits the statutory claim without first convening a three-judge court. The Supreme Court approved this procedure, observing that if a three-judge court had been convened, "in view of what we have said in Rosado . . . [the three-judge panel] could then merely pass the statutory claim back to the single judge." 415 U.S. at 544. See also *Doe* v. *Lavine*, 347 F. Supp. 357, 359-60 (S.D.N.Y. 1972) (Gurfein, J.). The single district judge thus had power to hear the statutory claim. Since Judge Clarie granted the injunction, we do not face the problem in *Morrow* v. *Clifford*, 502 F.2d 1066 (3d Cir. 1974), criticized in 88 Harv. L. Rev. 1028 (1975), holding that the power of the single district judge in these circumstances does not extend to the *denial* of an injunction.

For the same reasons this court has jurisdiction of the present appeal, even though the statutory claim decided below might have been properly decided by the three-judge panel, see *King* v. *Smith*, *supra*, in which event the appeal would lie only to the Supreme Court, 28 U.S.C. § 1253. See *Hagans* v. *Lavine*, *supra*, 415 U.S. at 543.

mined that the Retirement Act violates Title VII insofar as it discriminates in favor of women over men in the number of years of service eligibility required for retirement and in the computation of retirement benefits. See ____ F. Supp. ____ (D. Conn. 1974). He rejected defendants' contention that this suit was in reality one against the State of Connecticut and as such barred from federal court by the Eleventh Amendment to the Constitution, since the defendants here were sued individually and the state's immunity is not shared by state officials who act unconstitutionally or contrary to federal law. *Ex Parte Young,* 209 U.S. 123 (1908); *Scheuer* v. *Rhodes,* 416 U.S. 232, 237 (1974). Defendants did not appeal from the court's determination that the Retirement Act violates Title VII, nor from the injunction against future payments from the Retirement Fund or from other state moneys under the Retirement System in a manner which would discriminate against men on the basis of sex.

The section of Title VII prescribing remedies which a court may employ against violation of that title states that, in addition to enjoining an unlawful employmen practice, the court may

> "order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees with or without back pay . . . or any other equitable relief as the court deems appropriate." 42 U.S.C. § 2000e-5(q).

In addition to injunctive relief, plaintiffs also sought in their complaint an order requiring defendants to recalculate for all living retired male employees the benefits to which similarly situated female employees would have been entitled, and to pay out to the retired male employees the difference between the recalculated benefits and the benefits actually

received.[3] Costs and reasonable attorneys' fees were also demanded pursuant to 42 U.S.C. § 2000e-5(k).[4] Chief Judge Clarie, however, determined that under the Supreme Court's recent decision in *Edelman* v. *Jordan*, 415 U.S. 651 (1974), a federal court is barred by the Eleventh Amendment, absent the state's waiver or consent, from awarding a retroactive money judgment that would be satisfied by a "payment of funds from the state treasury." 415 U.S. at 677.

On this appeal plaintiffs argue that there are several critical factors present in this case that did not confront the *Edelman* court. While we agree that *Edelman* v. *Jordan* is not in all respects controlling in this case, we believe Judge Clarie correctly resolved the Eleventh Amendment issue with respect to the back pay claim, and affirm. We reverse his holding, however, insofar as it barred the attorneys' fee claim.

DISCUSSION

The Eleventh Amendment to the Constitution states:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

Adopted in 1798, the Amendment was enacted in direct response to widespread dissatisfaction with the Supreme Court's

---

[3]Plaintiffs suggested several time periods which might be appropriate for the calculation of retrospective benefits. Judge Clarie did not determine which is appropriate, and in view of our holding, we also find it unnecessary to reach this question.

[4]Section 2000e-5(k) provides:

> "(k) In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person."

1793 decision in *Chisholm* v. *Georgia*, 2 Dall. 419, which held that under Article III, § 2,[5] federal jurisdiction extended to a suit against the State of Georgia brought by South Carolina citizens to collect a debt owed by that state to an estate of which plaintiffs were executors.[6] Since the Amendment was intended to reverse the *Chisholm* decision,[7] it has been interpreted not literally but according to its purpose of restoring to Article III the "fundamental rule of jurisprudence" that "a state may not be sued without its consent," *Ex Parte New York*, 256 U.S. 490, 497 (1921). For instance, in fulfillment of the overall objective of protecting the sovereign immunity of the states the Court has decided that a suit for damages against a state by a citizen of the *same* state, though not specifically prohibited by the Amendment's language, is barred. *Hans* v. *Louisiana*, 134 U.S. 1 (1890). See also, e.g., *Principality of Monaco* v. *Mississippi*, 292 U.S. 313 (1934) (suits by foreign countries as well as foreign citizens barred); *Ex Parte New York, supra* (state immune from private actions in admiralty as well as "suits in law or equity").

---

[5]Article III, § 2, clause 1 provides:

> "The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; — between Citizens of different States;— between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

[6]See 1 C. Warren, *The Supreme Court in United States History* 96 (1922). Warren observes that the surprise with which the *Chrisholm* decision was greeted is attributable to the fact that "the vesting of any such jurisdiction over the sovereign states had been expressly disclaimed and even resented by the great defenders of the Constitution, during the days of the contest over its adoption." *Id.*

[7]See Cullison, *Interpretation of the Eleventh Amendment*, 5 Houston L. Rev. 1, 6-14 (1967).

Likewise following this principle, the Supreme Court has long held that even though the state is not a named party the shield provided by the Amendment may in an appropriate case be invoked by the defendants, see, e.g., *In re Ayers*, 123 U.S. 443 (1887); *Louisiana* v. *Jumel*, 107 U.S. 711 (1882). Looking to substance rather than to form, the Court decided that immunity should not depend on "the mere names of the titular parties but . . . the essential nature and effect of the proceeding, as it appears from the entire record." *Ex Parte New York*, 256 U.S. 490, 500 (1921); see *Hagood* v. *Southern*, 117 U.S. 52, 67 (1886); *Smith* v. *Reeves*, 178 U.S. 436, 438-40 (1900). "[W]hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest . . .," *Ford Motor Co.* v. *Department of the Treasury*, 323 U.S. 459, 464 (1945), and the Eleventh Amendment bars a private suit "seeking to impose a liability which must be paid from public funds in the state treasury . . .," *Edelman* v. *Jordan*, 415 U.S. 651, 663 (1974); see *Kennecott Copper Corp.* v. *State Tax Comm'n*, 327 U.S. 573 (1946); *Great Northern Life Ins. Co.* v. *Read*, 322 U.S. 47 (1944).

On the other side of the coin, the Eleventh Amendment does not bar a suit to enjoin enforcement by a state officer of an unconstitutional state statute. *Ex Parte Young*, 209 U.S. 123 (1908). The Court, in reaching this result, relied on the common law principle that a state officer acting illegally is deemed to act "without the authority of" the state and therefore outside its shield of sovereign immunity. 209 U.S. at 159-60. Furthermore, although the Eleventh Amendment shields the state against a retroactive award of monetary damages payable out of the state treasury as compensation for its past breach of a legal duty, a judgment requiring a state to expend some public funds in connection with obtaining or implementing injunctive relief against it is permissible, even though the award in such a case has "an ancillary effect on the

state treasury," *Edelman* v. *Jordan*, 415 U.S. 651, 668 (1974); *Jordan* v. *Fusari*, 496 F.2d 646, 651 (2d Cir. 1974).

Plaintiffs here contend that the "recalculated benefits" sought by them would be paid neither by the defendants personally nor out of "public funds in the state treasury" but from the Retirement Fund[8] pursuant to Conn. Gen. Stat. § 5-156 which provides:

> "All member contributions and state appropriations shall be held in a *separate retirement fund* by the treasurer, who may invest and reinvest as much of the fund as is not required for current disbursements. . . ." (Emphasis added).

Since all retirement benefit moneys are first paid into this "separate fund," plaintiffs argue that this case does not come within the rule of *Ford Motor Co.* and *Edelman* and that the Eleventh Amendment is therefore no bar to the action. Although the defendants did not deem this argument worthy of response in their brief, the substantiality of plaintiffs' assertion has been focused by a recent District of Rhode Island decision holding that Rhode Island's state retirement fund was unprotected by the state's Eleventh Amendment shield. *Bowen* v. *Hackett*, ____ F. Supp. ____ (D.R.I. Jan. 16, 1975), Civ. Nos. 5038 and 5043.

In determining whether a separate state agency or institution shares the Eleventh Amendment shield as an "alter ego" of the state, a court must look to numerous factors, no one of which is conclusive, see *Krisel* v. *Duran*, 258 F. Supp. 845, 848-49 (S.D.N.Y. 1966) (Weinfeld, *J.*), *affd. per curiam*,

---

[8]Plaintiffs have apparently changed their view of the source of the award of back benefits. Their amended complaint simply sought an award from "the retirement fund *and/or state moneys*." (Emphasis added).

386 F.2d 179 (2d Cir. 1967), *cert. denied*, 390 U.S. 1042 (1968); *Zeidner* v. *Wulforst*, 197 F. Supp. 23 (E.D.N.Y. 1961); cf. *State Highway Comm'n* v. *Utah Const. Co.*, 278 U.S. 194, 199 (1929). The most important, of course, is whether, in the event plaintiff prevails, judgment will have to be paid out of the state treasury. *Whitten* v. *State University Const. Fund*, 493 F.2d 177, 180 (1st Cir. 1974) (Moore, *J.*); *Gordenstein* v. *University of Delaware*, 381 F. Supp. 718, 721 (D. Del. 1974); *Bowen* v. *Hackett*, *supra*; *Krisel* v. *Duran*, *supra*, 258 F. Supp. at 849; see *Edelman* v. *Jordan*, *supra*, 415 U.S. at 663. Also to be considered is whether the entity sued is performing a governmental or proprietary function, whether it has been separately incorporated, whether it has the power to sue and be sued and enter into contracts, the degree of autonomy over its operations, and whether the state has immunized itself from responsibility for the agency's operations. See *Whitten* v. *State University Const. Fund*, *supra*, 493 F.2d at 179-80; *Gordenstein* v. *University of Delaware*, *supra*; *Krisel* v. *Duran*, *supra*.[9]

In concluding in *Bowen* v. *Hackett* that the Rhode Island retirement fund was not an "alter ego" of the state, the court found that the fund was created solely from the contributions of employees and that the state had no legal duty to replenish the fund if it should become depleted or pay a judgment against the fund. Here the situation is vastly different. Regardless of whether Connecticut would be liable for a judgment against the Retirement Fund, the state is required to appropriate funds on an actuarial basis, the amount being determined each year, and to pay *at least* 75% of the total retirement income payments for each year. Conn. Gen. Stat.

---

[9]Determination of the scope of the Eleventh Amendment shield is a matter of federal law, *Matherson* v. *Long Island State Park Comm'n*, 442 F.2d 566, 568 (2d Cir. 1971), but state law must be analyzed to determine the status of the sued entity in the government structure of the state, *Skehan* v. *Board of Trustees*, 501 F.2d 31, 41 (3d Cir. 1974).

§5-156a. A judgment against the fund would thus automatically increase the obligations of the general state treasury[10] and amount to a judgment against the state. Furthermore, the Connecticut Retirement Fund has none of the indicia of independence from the state, such as separate incorporation or a power to sue in its own name. It is controlled by the state treasurer, see Conn. Gen. Stat. §5-156. Although the money in it may be used only for a designated purpose, it nonetheless remains "public money." *Whitten* v. *State University Const. Fund, supra; Bowen* v. *Hackett, supra; cf. Kennecott Copper Corp.* v. *State Dep't of Taxation*, 327 U.S. 573 (1946) (tax payments held in separate fund.)

Plaintiffs' argument thus boils down to an assertion that the effect on the general public treasury is permissibly indirect because the state treasury will not feel the pinch until the time comes for the next annual appropriation to the fund. However, this view would distort the meaning of the term "ancillary" as used by the Court in *Edelman* and would have the effect of sharply curtailing, if not emasculating, the concept of a "suit against the state." Accordingly, we hold that the action here, insofar as it seeks damages, is in essence against the state and as such is subject to the Eleventh Amendment.[11]

Plaintiffs' major contention is that, even assuming that the action is properly characterized as one against the state which would normally entitle the state to invoke its Eleventh Amendment immunity, the state here has waived that immunity and in effect consented to suit. Although barriers to

---

[10]Conn. Gen. Stat. § 5-156 provides that the legislature "shall appropriate" to the retirement fund the amount needed to maintain actuarially required levels.

[11]Although not controlling, another persuasive factor in reaching this conclusion is that Connecticut law treats money in the retirement fund as "public money." *Dowe* v. *Egan*, 133 Conn. 112, 48 A.2d 735 (1946).

federal court jurisdiction normally may not be "waived" by the parties, *Mansfield, Coldwater & Lake Michigan Ry.* v. *Swan*, 111 U.S. 379, 384 (1884), it has been long held that a state may consent to a suit that would otherwise be barred by the Eleventh Amendment, see, e.g., *Clark* v. *Barnard*, 108 U.S. 436 (1883), since the purpose of the Amendment is merely to limit federal jurisdiction to those suits to which a state has not consented.

Plaintiffs do not suggest that consent to their suit was expressly or directly given by the State of Connecticut. Rather they argue that waiver or consent may be inferred from certain action taken by the state itself, and that in any event Congress was vested by the Fourteenth Amendment to modify Connecticut's immunity in civil rights suits.

First it is argued that Connecticut waived its immunity by its own enactment of certain laws. Plaintiffs rely on Article II, clause 4 of the state Constitution which provides, "Claims against the state shall be resolved in such manner as may be provided by law." It is sufficient that the Connecticut state courts, albeit in the context of a different type of claim, have determined that this section does not waive sovereign immunity, *Fidelity Bank* v. *State of Connecticut*, 35 Conn. L.J. No. 39 (March 26, 1974). But even if Connecticut allowed suit against it in the context of a claim for damages due to discrimination, it is settled that a state may "give its consent to be sued in its own courts by private persons or by corporations, in respect of any cause of action against it and at the same time exclude the jurisdiction of the Federal courts . . .," *Smith* v. *Reeves*, 178 U.S. 436, 445 (1900).[12] In-

---

[12]The *Smith* v. *Reeves* Court noted that the state's power to limit its consent is:

> "subject always to the condition, arising out of the supremacy of the Constitution of the United States and the laws made in pursuance thereof, that the final judgment of the highest court of the State in any action brought against it with its consent

deed unless a "clear indication" to submit to suit in federal as well as state court can be found, a federal court cannot read the state's consent to be sued in its own courts as embracing federal jurisdiction. *Great Northern Life Ins. Co.* v. *Read*, 332 U.S. 47, 54 (1944); *Knight* v. *State of New York*, 443 F.2d 415, 419 (2d Cir. 1971) (Friendly, *J.*). Here, there is not the slightest indication of intent to submit to federal suit.

For the same reasons plaintiffs' citation of various provisions of the Connecticut Constitution and statutes prohibiting discrimination in that state is of no avail. See, e.g., Conn. Const. Art. I, §20, Conn. Gen Stat. §§4-61c to 4-61j. Even if these sections authorized a damage action for discrimination against the state, no possible inference could be drawn that the state had also consented to a similar action in federal court. *Great Northern Life, supra; Knight* v. *State of New York, supra.*

Before reaching the more troublesome question of whether Connecticut has waived its immunity by engaging in activity subject to Congressional regulation under the Fourteenth Amendment, we must first determine whether Title VII as amended has authorized a private action for damages against the state. If it has not, that would be the end of the matter, since in the absence of Congressional authorization plaintiffs would be out of court. Serious doubts are raised as to existence of such authority by the Supreme Court's recent decision in *Employees* v. *Department of Public Health & Welfare*, 411 U.S. 279 (1973), where it faced a similar problem under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 200, *et seq.* In 1966 the FLSA, which regulates the working conditions of those producing goods for commerce,

---

may be reviewed or reexamined, as prescribed by the act of Congress, if it denies to the plaintiff any right, title, privilege or immunity secured to him and specially claimed under the Constitution or laws of the United States." 178 U.S. at 445.

was amended to bring within its scope state-operated hospitals and the employees thereof, see Pub. L. 89-601, 80 Stat. 830-32, 837 (Sept. 23, 1966). Prior thereto states had been excluded from the Act. Section 16(b) of FLSA, 29 U.S.C. § 216(b), which authorized a private action against an employer for amounts of unpaid minimum wages or overtime compensation in "any court of competent jurisdiction," remained unchanged by the 1966 Amendments. The Court held that although Missouri was covered by the "literal" language of the FLSA and subject to its substantive provisions, *Maryland* v. *Wirtz*, 392 U.S. 183 (1968), Congress had not sufficiently indicated an intention to sweep away Missouri's immunity from private suit. In reaching this conclusion the Court relied upon several circumstances: Congress' failure to change the remedial provisions of § 16(b) in amending the Act; the harshness of the monetary penalties provided by the Act in addition to recovery of actual damages; and the Act's provision for its enforcement by the Secretary of Labor in federal court and apparently by any party in state court. 411 U.S. at 285-86. The Court concluded that the "delicate federal-state relationship" was preserved under the Act by remitting private parties to federal court relief only through the Secretary of Labor. *Id.*

The amendments to Title VII, like those to the FLSA, merely changed the definition of "employer" to include the states,[13] and did not specifically deal with the question of a state's immunity from suit. Nor does Title VII's legislative history reveal a specific intention to lift that immunity. However, it is evident that the 1972 amendments to Title VII, unlike the amendments to the FLSA reviewed by the court in *Employees*, did contemplate private actions against state governments or their agencies. Title 42 U.S.C. § 2000e-5(f)(1),

---

[13]See note 1 *supra*.

the relevant portion of which is set out in the margin,[14] spells out the manner in which a civil action may be brought after a complaint is filed with the Commission. Actions against a "government, governmental agency or political subdivision"

may be prosecuted in the first instance only by the Attorney General, but aggrieved employees may intervene in such an action. If the Attorney General does not commence the action or enter into a conciliation agreement within 180 days, the aggrieved employees may commence a private suit against the government or governmental agency within 90 days thereafter. By providing these special procedures for suits involving governments, Congress here demonstrated an intention to make available in some cases private suits against governments. That *state* employees were to be put on a par

---

[14] "(f)(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice."

with all other employees is evidenced by statements in both the House and Senate Reports accompanying the 1972 amendments to the effect that all state and local government employees were to have access to the remedies available under the Act.[15] Thus, unlike the situation in *Employees*, Congress intended to authorize a private suit for backpay by state employees against the state. To suggest otherwise would be to hold Congress to a degree of legislative specificity it could not and does not customarily meet. See *Employees* v. *Department of Public Health & Welfare*, 411 U.S. at 289-90 (Marshall, *J.*, concurring).

Although we must conclude that Congress authorized private damage suits against the states for violation of Title VII, we reject any suggestion that an inference of voluntary waiver or consent may be drawn from the state's mere continuance of its governmental function of hiring employees to perform state duties and of providing for their working conditions, including retirements. It is obvious that Connecticut, which had engaged in these activities as an essential part of

---

[15]The House Report of the 1972 Act notes:

> "Few of [the many state and local government] employees are afforded the protection of an effective forum to assure equal employment. The bill amends section 701 of the Civil Rights Act of 1964 . . . . to include State and local governments, governmental agencies and political subdivisions within the definition of 'employer' under Title VII. *All State and local government employees would under the bill have access to the remedies available under the Act.*" House Rep. No. 92-238 (92d Cong., 1st Sess. 1971), 1972 U.S. Code Cong. & Admin. News at 2152 (emphasis added).

Similarly, the Senate Report stated:

> "The Committee believes that employees of State and local governments are entitled to the same benefits and protections in equal employment as the employees in the private industry section of the economy.
>
> ". . . By amending the present section 701 to include state and local governmental units within the definition of an 'employer' under Title VII, all State and local governmental employees would, under the provisions of the bill, have access to the remedies under the Act." Senate Rep. No. 92-415 (92d Cong., 1st Sess. 1971) in *Legislative History of the Equal Employment Opportunity Act of* 1972 at 418.

its functions long before Title VII was amended to include the states, would, regardless of the amendment, have no choice but to continue doing so thereafter or cease functioning as a state. Thus no basis exists for finding voluntary waiver. Cf. *Fay* v. *Noia*, 372 U.S. 391, 439 (1963); *Johnson* v. *Zerbst*, 304 U.S. 458 (1938). See Note, Private Suits Against States in Federal Courts, 33 U. Chi. L. Rev. 331, 336 (1966). Although its continued engagement in these activities might conceivably be labelled a "constructive" consent, the Supreme Court in *Edelman* v. *Jordan*, 415 U.S. 651, 673 (1974), stated that "[c]onstructive consent is not a doctrine commonly associated with the surrender of constitutional rights, and we see no place for it here."

Parden v. *Terminal Ry. Co.*, 377 U.S. 184 (1964), relied upon by plaintiffs, is clearly inapposite. There the State of Alabama, in face of the fact that interstate railroads were subject to the Federal Employees Liability Act, 45 U.S.C. §§ 51, *et seq.*, and had been subjected to extensive regulation by Congress, see *California* v. *Taylor*, 353 U.S. 553 (1957) (state-owned railroad subject to Railway Labor Act); *United States* v. *California*, 297 U.S. 175 (1936) (same subject to Federal Safety Appliance Act), undertook the operation of such a railroad, which was essentially a proprietary business. In these circumstances a finding of voluntary waiver of constitutional immunity from suit was fully justified. No such situation exists here. Connecticut's employment of its employees and adoption of a retirement system had long predated Title VII.

Plaintiffs next contend that, even assuming that Connecticut has not by its own conduct waived its Eleventh Amendment immunity or consented to suit, Congress nevertheless had the power to subject it to a private action for damages for denial of civil rights. While conceding that Congress cannot expand the scope of federal jurisdiction beyond the limits

of the Constitution, *Marbury* v. *Madison*, 1 *Cranch* 137 (1803), plaintiffs assert that Congress' power may be found in the Fourteenth Amendment, which must be deemed to have modified the Eleventh in the area of civil rights. Plaintiffs point to the history of the Fourteenth Amendment, which evolved from a dissatisfaction with the states' failure to protect the civil rights of their citizens, and to the statements of various Congressmen who objected to the post-Civil War legislation on the ground that it would impair the "sovereignty" of the States.[16] It is argued that "[i]nasmuch as the post-Civil War-amendments were, by their essential nature, inconsistent with the existence of a sovereign immunity defense, the states by ratifying those Amendments waived to a limited extent their general right not to be sued by a private citizen." We disagree.

The question is not as broad as applicants would have it. Essentially it is a narrow one, which deals more with procedure than substance, i.e., whether the particular remedy sought here, a private federal action for retroactive damages, is a constitutionally permissible method of enforcing Fourteenth Amendment rights, notwithstanding the immunity granted to the states by the Eleventh Amendment. Accepting the fact that legislation enforcing individual rights under the Fourteenth Amendment must to some extent subject states

---

[16]For example, plaintiffs quote Congressman Rogers, who, opposing the 1866 Civil Rights Bill, stated:

> "I ask you to stand by the law of the country and to regulate these Federal and State systems upon the grand principles upon which they were intended to be regulated, that we may hand down to those who are to come after us this bright jewel of civil liberty unimpaired; and I say that the Congress or men who will strip the people of these rights will be handed down to perdition for allowing this bright and beautiful heritage of civil liberty embodied in the powers and sovereign jurisdiction of the States to pass away from us." Cong. Globe, 39th Cong., 1st Sess. 1122-23.

to private suits, it does not follow that Congress necessarily has power to provide the particular remedy sought here.[17]

To the extent that a tension exists between enforcement of rights under the Fourteenth and the state's immunity under the Eleventh, our duty is to reconcile and give effect to both amendments insofar as possible. See *Prout* v. *Starr*, 188 U.S. 537, 543-44 (1903). Observing that "particularly after the Civil War, Congress undertook to make federal courts the primary guardians of constitutional rights," Justice Brennan in his separate opinion in *Perez* v. *Ledesma*, 401 U.S. 82, 106 (1971), recognized that "*Ex Parte Young* was the culmination of efforts by this Court to harmonize the principles of the Eleventh Amendment with the effective supremacy of rights and powers secured elsewhere in the Constitution." *Edelman* v. *Jordan*, *supra*, must be read as reaffirming the necessity of maintaining this balance between enforcement of individual constitutional rights and protection of the state's fiscal administration under the Eleventh. See 415 U.S. at 666-69; The Supreme Court, 1973 Term, 88 Harv. L. Rev. 41, 247 (1974).

This desirable balance should not be upset in the context of suits to enforce Fourteenth Amendment rights unless other

---

[17]Plaintiffs argue that the

> "Civil War Amendments created precisely the circumstances in which immunity had no place, by stripping states of their hitherto existing sovereign power to sanction slavery, deny equal protection or due process of laws, or abridge the right to vote on account of race. In the limited areas prescribed by these Amendments the states have *no authority the exercise of which can be protected from litigation*, and in such cases the purpose underlying the Eleventh Amendment cannot be served." (Emphasis added).

This argument suggests that Congress has unlimited power to provide remedies to enforce the Fourteenth Amendment. But the mere fact that Congress may constitutionally apply the substantive provisions of certain legislation against the states is not inconsistent with the fact that certain remedies may not be available against the states. *Maryland* v. *Wirtz*, 392 U.S. 183, 200 (1968). See also *California* v. *Taylor*, 353 U.S. 553, 568 n.16 (1957).

means that might be made available for enforcement of rights under that Amendment are so ineffective that Congress, in promulgating the Fourteenth Amendment after its adoption by more than three-quarters of the Union, necessarily implied that the Eleventh Amendment's remedial bar to a damage action against a state must yield. There is no reason to find such a necessary implication, however, since Congress, under the balance as reaffirmed in *Edelman,* has at its disposal various methods other than private federal damage suits for enforcing Fourteenth Amendment rights.

The prospective injunctive relief available under *Ex Parte Young,* if it stood alone, should offer adequate relief as a remedy for enforcement of Fourteenth Amendment rights against the states. However, other remedies either are or may be made available. The Eleventh Amendment presents no bar to a suit by the United States against a state, *United States* v. *Mississippi,* 380 U.S. 128 (1965). Congress can authorize a suit by the federal government on a private plaintiff's behalf and it has done so in Title VII. See 42 U.S.C. § 2000e-5(f)(1). A suit by the United States against a state to recover back benefits on behalf of persons protected by a federal statute is permissible. *Brennan* v. *State of Iowa,* 494 F.2d 100, 104 (8th Cir. 1974); see *Department of Employment* v. *United States,* 385 U.S. 355 (1966).[18]

---

[18]Plaintiffs' claim that *United States* v. *Mississippi* authorizes their suit because it was brought "in place of the Attorney General" must, however, be rejected. While it is true that, following the procedures outlined in 42 U.S.C. § 2000e-5(f)(1), the instant suit was first referred to the Attorney General, whose chose not to sue but issued to the plaintiffs a "right to sue" letter, it can hardly be contended the United States is responsible for the management of this suit, thus meeting the concern of the *Employees Court* for maintaining the "delicate federal-state relationship," see p. 3937, *supra.* Nor can it even be contended that the United States is the real party in interest, cf. *Standing Rock Sioux Indian Tribe* v. *Dorgan,* 505 F.2d 1135, 1140 (8th Cir. 1974). Plaintiffs seek the back benefits solely for themselves; whatever interest the public had in this lawsuit has already been served by entry of the injunction. Moreover the failure of the Attorney General to prosecute this action himself can hardly be characterized as a finding that plaintiffs' suit is of special public interest.

Furthermore, although Congress did not suggest that jurisdiction over private actions under Title VII extends to state courts,[19] it might have done so.[20] State courts would have faced no constitutional barrier to granting the retrospective damage relief Congress authorized since they are free from the limitations of the Eleventh Amendment, which restrict only federal judicial power.[21] We need not consider whether Congress could, consistently with the Tenth Amendment, compel a state to permit its citizens to enforce their Fourteenth Amendment rights against it in its courts except to note that under the Supremacy Clause and the general principle that state courts are co-equal partners with the federal courts in the enforcement of federal law, see *Employees* v. *Department of Public Health and Welfare*, 411 U.S. 279, 298 (Marshall, *J.*, concurring); *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 339-40 (1816), state courts have been obligated to entertain congressionally-authorized private suits where state court jurisdiction extends to suits of the same character, see *Testa* v. *Katt*, 330 U.S. 386 (1947).[22]

Thus there is no reason in this case to depart from the balance between the Eleventh Amendment and other constitutional interests which was most recently reaffirmed in

---

[19]See 42 U.S.C. § 2000e-5(f)(3).

[20]Congress has made state courts available for private federal damage actions against the states under the Fair Labor Standards Act, § 16(b), 29 U.S.C.A. § 216(b) (1975 Supp.) (as amended April 8, 1974), and the Federal Employers Liability Act, § 6, 45 U.S.C. § 56.

[21]Plaintiffs point out that the Fourteenth Amendment was passed at a low ebb of confidence in the willingness of the state courts to comply with this duty, see, e.g., *Mitchum* v. *Foster*, 407 U.S. 225, 240-42 (1972); *Monroe* v. *Pape*, 365 U.S. 167, 174-80 (1961). But even so, there is little need to assume that the duties otherwise imposed on the states would not be sufficient to remedy problems of state recalcitrance without also reading into the Fourteenth Amendment a *sub silentio* elimination of the states' Eleventh Amendment rights.

[22]Of course a state might decline to exercise such congressionally-mandated jurisdiction on grounds of soverign immunity. However, this would pose a problem distinct from the question of the scope of federal remedial power under the Eleventh Amendment.

Edelman. In any event it may not still be open to this court to accept plaintiffs' invitation to disregard the Eleventh Amendment in Fourteenth Amendment cases. While Justice Marshall's dissent in *Edelman* suggested that the Supreme Court had not decided whether the Eleventh Amendment is limited by the later enactment of the Fourteenth, 415 U.S. at 694 n.2, the majority in that case expressly overruled *Shapiro* v. *Thompson*, 394 U.S. 618 (1969), *State Department of Health and Rehabilitative Services* v. *Zarate*, 407 U.S. 918 (1972) (per curiam), and *Wyman* v. *Bowens*, 397 U.S. 49 (1970) (per curiam), all cases involving Fourteenth Amendment causes of action, insofar as those cases allowed assessment of retroactive damages against the state. 415 U.S. at 670-71. See also *Wilkerson* v. *Meskill*, 501 F.2d 297 (2d Cir. 1974), in which this court affirmed *per curiam* on the basis of *Edelman* a dismissal of plaintiff's claims to back wages from the state based on equal protection and due process, although without considering the arguments presented here. Further see *Skehan* v. *Board of Trustees*, 501 F.2d 31, 42 n.7 (3d Cir. 1974); *Burton* v. *Waller*, 502 F.2d 1261, 1273 (5th Cir. 1974), *cert. denied*, 43 U.S.L.W. 3474 (U.S. No. 74-875 Mar. 4, 1975).

Plaintiffs' request for costs and attorneys' fees stands on a different footing. While the district court was without jurisdiction to entertain the plaintiffs' claims for retroactive damages against the state, the court did have jurisdiction to entertain the claim for prospective injunctive relief against state officers, *Ex Parte Young*, *supra*, based on the state's failure in its duty to conform its conduct to federal law and its threatened continuation on the same illegal course in the future. In order to invoke the court's power to enjoin such future illegal conduct, it was necessary to incur costs and attorneys' fees which, as we recently held in *Class* v. *Norton*, 505 F.2d 123, 126-27 (2d Cir. 1974), may be assessed as having a permissible "ancillary effect" on the state treasury, see *Edelman* -. *Jordan*, 415 U.S. at 667-68, of a prospective order.

See *Sims* v. *Amos*, 409 U.S. 942 (1973), *aff'g*, 340 F.Supp. 693 (M.D. Ala. 1972) (three-judge court); *Souza* v. *Travisono*, No. 74-1243 (1st Cir. Mar. 11, 1975), Slip Opin. at 4-6. We adhere to *Class* and accordingly decline to join those circuits which have denied attorneys' fees, see *Skehan* v. *Board of Trustees*, 501 F.2d 31, 42 (3d Cir. 1974); *Jordan* v. *Gilligan*, 500 F.2d 701 (6th Cir. 1974); *Taylor* v. *Perini*, 503 F.2d 899, 901 (6th Cir. 1974); *Named Indiv. Members of San Antonio Conservation Soc'y* v. *Texas Highway Dept.*, 496 F.2d 1017, 1026 (5th Cir. 1974).

For the foregoing reasons we remand the case to the district court for the purpose of determining in its sound discretion whether an award of attorneys' fees is appropriate and, if so, the amount that may reasonably be awarded.

Supreme Court, U. S.
FILED
NOV 24 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1975

No. 75-283

FREDERICK BITZER, et al.,

Petitioners,

v.

DONALD MATTHEWS, et al.,

Respondents.

BRIEF FOR RESPONDENTS REGARDING PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Paul W. Orth
Austin Carey, Jr.
266 Pearl Street
Hartford, Connecticut 06103

Edward Gallant
760 Capitol Avenue
Hartford, Connecticut 06106

Counsel for Respondents

INDEX

Page

Opinions Below 1

Jurisdiction 1

Counterstatement of Question Presented 2

Constitutional and Statutory Provisions Involved 2

Statement of the Case 3

Argument 3

Conclusion 7

Table of Authorities

Cases: Page

Alyeska Pipeline Service Co. v. The Wilderness Society, 421 U.S. 240 (1975) 4, 5, 6

Amos v. Sims, 409 U.S. 942 (1972), aff'g 340 F. Supp. 691 (M.D. Ala.) 6

Boston Chapter N.A.A.C.P., Inc. v. Beecher, 504 F.2d 1017 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975) 6

Edelman v. Jordan, 415 U.S. 651 (1974) 5

Gates v. Collier, 489 F.2d 298 (5th Cir. 1973) *vacated and remanded*, ___ F.2d ___, No. 73-1790 (5th Cir. *en banc*, dec. 10/29/75) 5, 6

Jordon v. Gilligan, 500 F.2d 701 (6th Cir. 1974), *cert. denied*, 421 U.S. 991 (1975) 3, 4, 6

Milburn v. Huecker, 500 F.2d 1279 (6th Cir. 1974) 4

Named Individual Members of the San Antonio Conservation Society v. Texas Highway Dept., 496 F.2d 1017 (5th Cir. 1974); *cert. denied*, 420 U.S. 926 (1975) on other grounds; aff'd (5th Cir. *en banc*, dec. 9/25/75) 3, 4, 5

Neuman v. State of Alabama, 503 F.2d 1320 (5th Cir. 1974); *vacated and remanded*, ___ F.2d ___, No. 73-2033 (5th Cir. *en banc*, dec. 10/29/75) 5

Skehan v. Trustees of Bloomsburg State College, 501 F.2d 31 (3d Cir. 1974), *vacated and remanded*, 421 U.S. 983 (1975) 3, 4, 5, 6

Taylor v. Perini, 503 F.2d 899 (6th Cir. 1974), *vacated and remanded*, 421 U.S. 982 (1975) 3, 4, 5

Thonen v. Jenkins, 517 F.2d 3 (4th Cir. 1975) 5

Statutes:

42 U.S.C. 2000e-5(k) 4

Miscellaneous:

Note, "Attorneys' Fees and the Eleventh Amendment," 88 Harv. L.Rev. 1875 (June 1975) 5

IN THE

Supreme Court of the United States

October Term, 1975

No. 75-283

FREDERICK BITZER, et al.,

Petitioners,

v.

DONALD MATTHEWS, et al.,

Respondents.

BRIEF FOR RESPONDENTS REGARDING PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Opinions Below

The opinion of the Court of Appeals for the Second Circuit (pg. 26a of Appendix to Petition) is reported at 519 F.2d 559. The opinion of the District Court for the District of Connecticut (pg. 2a of Appendix to Petition) is reported at 390 F. Supp. 278.

Jurisdiction

The jurisdictional requisites are adequately set forth in the petition.

Counterstatement of Question Presented

Whether, if private individuals prevail against state officials in a suit under Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. Sec. 2000e *et seq.*, the Eleventh Amendment bars an award to those plaintiffs of reasonable attorneys' fees as a part of the costs.

Constitutional and Statutory Provisions Involved

The Eleventh Amendment to the United States Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Reference is also made to those portions of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. Sec. 2000e *et seq.*, set

forth in respondents' own petition for Writ of Certiorari in No. 75-251. In particular, 42 U.S.C. 2000e-5(k) provides in pertinent part that:

> "In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs..."

Statement of the Case

The case is adequately stated in the petition, except that it should be noted that the respondents have also petitioned the Court for a Writ of Certiorari to review the judgment and opinion of the Second Circuit to the extent that it held that in a suit by private individuals against state officials, the award of backpay expressly authorized by Congress in the Equal Employment Opportunity Act of 1972 (amending Title VII of the Civil Rights Act of 1964) is barred by the Eleventh Amendment. *Fitzpatrick v. Bitzer,* No. 75-251. That question is closely related to the question here presented, and both, in our view, present important federal questions which should be decided by this Court.

Argument

The petitioners herein have submitted as their sole reason for the granting of their petition a purported conflict between the decision of the Second Circuit below and decisions of the Third, Fifth and Sixth Circuits in *Jordon v. Gilligan,* 500 F.2d 701 (6th Cir. 1974); *Taylor v. Perini,* 503 F.2d 899 (6th Cir. 1974); *Named Individual Members of the San Antonio Conservation Society v. Texas Highway Dept.,* 496 F.2d 1017 (5th Cir. 1974); and *Skehan v. Trustees of Bloomsburg State College,* 501 F.2d 31 (3d Cir. 1974). At least from a technical standpoint, however, a conflict does not exist.

In each of the four cases cited by the petitioners, it was indeed held that an award of attorneys' fees against state officials was barred by the Eleventh Amendment. This rationale clearly conflicts with the reasoning of the Second Circuit in its decision below. See *Alyeska Pipeline Service Co. v. The Wilderness Society,* 421 U.S. 240, 269 n.44 (1975). However, in none of those four cases was the claim for attorneys' fees based upon express statutory authority, as is the situation here. It is then not certain, although highly probable, that at least the Third and Sixth Circuits would follow that rationale when confronted with a federal statute, such as 42 U.S.C. 2000e-5(k), which expressly authorizes that which in their view the Eleventh Amendment prohibits.

Also, the present viability of each of these four decisions is questionable. *Jordon v. Gilligan, supra,* conflicted with a contemporaneous decision of another panel of the Sixth Circuit in *Milburn v. Huecker,* 500 F.2d 1279 (6th Cir. 1974). This conflict was resolved in *Taylor v. Perini, supra,* which then became "the ultimate position of [the Sixth] Circuit", 503 F.2d at 912 (dissent). On May 27, 1975, *Taylor v. Perini* was vacated and remanded for reconsideration in light of *Alyeska Pipeline Service Co. v. The Wilderness Society, supra,* 421 U.S. 982. On the same date *Skehan v. Board of Trustees of Bloomsburg State College, supra,* was also vacated and remanded with a similar instruction for reconsideration. 421 U.S. 983. Since both cases appear to be controlled by *Alyeska,* further consideration of the Eleventh Amendment issue in *Taylor* and *Skehan* has probably been obviated. Although a petition for Writ of Certiorari was denied in *Gilligan v. Jordon,* 421 U.S. 991 (1975), that decision, as was noted above, was not the "ultimate position" of the Sixth Circuit on the Eleventh Amendment issue.

The decision of the Fifth Circuit cited by the petitioners, *Named Individual Members of the San Antonio Conservation Society v. Texas Highway Dept., supra,* was in

direct conflict with a decision of another panel in that Circuit. *Gates v. Collier,* 489 F.2d 298 (5th Cir. 1973). In order to resolve this conflict, a consolidated hearing, *en banc,* was ordered for *Gates, Named Individual Members of the San Antonio Conservation Society,* and a third case, *Neuman v. State of Alabama,* 503 F.2d 1320, at 1321 n.1. Upon rehearing, the Fifth Circuit, *en banc,* over strong dissents, vacated and remanded *Gates* and *Neuman* for reconsideration in light of the supervening decisions in *Alyeska Pipeline Service Co. v. The Wilderness Society, supra,* and *Edelman v. Jordan,* 415 U.S. 651 (1974). *Gates v. Collier,* __F.2d__, No. 73-1790 (5th Cir. *en banc,* dec. 10/29/75); *Neuman v. State of Alabama,*___F.2d__, No. 73-2033 (5th Cir. *en banc,* dec. 10/29/75). The denial of attorneys' fees in *Named Individual Members of the San Antonio Conservation Society v. Texas Highway Dept.* was affirmed on the basis of *Alyeska.*__F.2d__, No. 74-1231 (5th Cir. *en banc,* dec. 9/25/75). (This Court had denied certiorari. 420 U.S. 926 (1975))

Although there may be no conflict in a narrow sense, however, respondents cannot conclude that the Third and Sixth Circuits would deviate in any material respects from their conclusions in *Skehan* and *Taylor.* They would rely mainly on the Second Circuit's decision regarding backpay in order to bar recovery of both backpay *and* attorneys' fees from state treasuries. That there is a conflict in the underlying reasoning of the several circuits on the meaning of *Edelman v. Jordan, supra,* cannot be questioned. See further, *Thonen v. Jenkins,* 517 F.2d 3, 7 (4th Cir. 1975); Note, "Attorneys' Fees and the Eleventh Amendment," 88 Harv. L.Rev. 1875, 1876, 1889 (June 1975).

As the Memorandum for the United States as Amicus Curiae indicates, resolution of the question regarding awards of attorneys' fees raised herein and of the closely related question regarding awards of backpay raised in respondents' petition for writ of certiorari, No. 75-251, is of great importance to the enforcement of Title VII of the Civil

Rights Act of 1964 in the public sector. So long as the ultimate resolution of these issues remains in doubt, the enforcement of Title VII by private individuals in suits against state officials will be significantly impaired and the limited resources of the Attorney General of the United States severely taxed. Currently there are substantial differences in rationale, not only among the several circuits, but until recently even among panels within at least two of the circuits. There also is a considerable question about the precedential significance of this Court's summary affirmance in *Amos v. Sims,* 409 U.S. 942 (1972) of 340 F. Supp. 691 (M.D. Ala.). Compare *Jordon v. Gilligan, supra,* 500 F.2d at 708-9 and *Skehan v. Trustees of Bloomsburg State College, supra,* 501 F.2d 42 at n.7 with *Boston Chapter N.A.A.C.P., Inc. v. Beecher,* 504 F.2d 1017, at 1029 (1st Cir. 1974) *cert. denied,* 421 U.S. 910 (1975) and *Gates v. Collier, supra,* 489 F.2d at 302. See also *Alyeska Pipeline Service Co. v. The Wilderness Society, supra,* 421 U.S. at 270, n.46.

This petition, like the one in No. 75-251, presents an important question of federal law which has not been, but should be, decided by this Court. As in No. 75-251, the meaning of prior decisions of this Court and the tension between the Eleventh and Fourteenth Amendments and enabling legislation under the latter is involved. To defer final resolution of either or both of these important questions would seriously retard the mechanism which Congress intended to be the primary means of enforcing the application of Title VII to state governments – the suit by private plaintiffs against state officials. A decision supporting the backpay and attorneys' fees relief against state officials and governments enacted by Congress in the Equal Employment Opportunity Act of 1972 pursuant to its authority under Section 5 of the Fourteenth Amendment, would of course remove that impediment to the Congressional purposes. If either or both of the remedies so established is barred by the Eleventh Amendment, the earliest possible decision to that effect also serves substantial and salutary purposes by allowing Congress promptly to

reconsider and revise the enforcement mechanism of Title VII, whether by increasing the Attorney General's staff and resources or otherwise.

CONCLUSION

For the above reasons, the respondents do not oppose the Petition for a Writ of Certiorari.

Respectfully submitted

Paul W. Orth
Austin Carey, Jr.
Edward Gallant

Counsel for Respondents

Supreme Court, U. S.
FILED
FEB 13 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-283

FREDERICK BITZER, ET AL.,
Petitioners,

v.

DONALD MATTHEWS, ET AL.,
Respondents,

BRIEF FOR THE PETITIONERS

CARL R. AJELLO
Attorney General

BERNARD F. McGOVERN, JR.
Assistant Attorney General

SIDNEY D. GIBER
Assistant Attorney General

30 Trinity Street
Hartford, Connecticut 06115

Counsel for Petitioners

February 5, 1976

INDEX

Page

OPINIONS BELOW 1

JURISDICTION 1

QUESTIONS PRESENTED 1

CONSTITUTIONAL PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 4

ARGUMENT:

Edelman v. Jordan Does Not Permit Recovery of Attorneys' Fees as a Permissible Ancillary Effect 5

There are no State Funds Available For Payment of Attorneys' Fees Unless They Are Specifically Included In The State Budget 9

The State of Connecticut Has Not Waived Its Immunity Under the Eleventh Amendment 11

CONCLUSION 15

CASES CITED

Page

Chandler v. *Dix*, 194 U.S. 590, 24 S.Ct. 766 (1903) 14

Class v. *Norton*, 505 F.2d 123 (2nd Cir. 1974) 7

Edelman v. *Jordan*, 415 U.S. 651, 94 S.Ct. 1347 (1974) 4, 5, 6 7, 14

Fitzpatrick v. *Bitzer*, 390 F.Supp. 278, 279 (D. Conn. 1974), aff'd in part, rev'd in part and remanded 519 F.2d 559 (2d Cir. 1975) 8

Great Northern Insurance Co. v. *Read*, 322 U.S. 47, 54, 64 S.Ct., 873 (1944) 14

Jordan v. *Fusari*, 496 F.2d 646 (2nd Cir. 1974) 7

Jordan v. *Gilligan*, 500 F.2d 701, 705 (6th Cir. 1974), cert. den. 421 U.S. 991, 95 S.Ct. 1996 (1975) 7

Murray v. *Wilson Distilling Co.*, 213 U.S. 151, 29 S.Ct. 458 (1909) 4

Named Individual Members v. *Texas Highway Department*, 496 F.2d 1017 (5th Cir. 1974) 8

Richin v. *Industrial Construction Inc.*, 502 F.2d 1051, 1055 (10th Cir. 1974) 14

Skehan v. *Board of Trustees of Bloomsburg State College*, 501 F.2d 31, 42 (3rd Cir. 1974), 421 U.S. 983, 95 S.Ct. 1986 (1975) 7

Smith v. *Reeves*, 178 U.S. 436, 20 S.Ct. 919 (1899) 14

Souza v. *Travisono*, 512 F.2d 1137 (1st Cir. 1975) 7

Taylor v. *Perini*, 503 F.2d 899 (6th Cir. 1974), vacated on other grounds, 421 U.S. 982, 95 S. Ct. 1985 (1975) 8

Page

United States Constitution and Statutes:

U.S. Constitution, Eleventh Amendment 2, 11, 13, 14, 15

28 U.S.C. § 1254(1) 1

42 U.S.C. § 2000e 2

State Constitution and Statutes:

Constitution of the State of Connecticut, Article 11, § 4 ... 11

§ 3-6, Connecticut General Statutes 10

§ 4-71, Connecticut General Statutes 9

§ 4-84, Connecticut General Statutes 11

§ 4-85, Connecticut General Statutes 10

§ 4-92, Connecticut General Statutes 11

§ 4-94, Connecticut General Statutes 10

§ 4-97, Connecticut General Statutes 9, 10, 11

§ 4-97a, Connecticut General Statutes 10

§ 5-241, Connecticut General Statutes 10

§ 52-556, Connecticut General Statutes 14

Chapter 53, Connecticut General Statutes 12, 13, 14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-283

FREDERICK BITZER, ET AL.,
Petitioners,

v.

DONALD MATTHEWS, ET AL.,
Respondents,

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit (pg. 26a of Appendix to Petition) is reported at 519 F.2d 559. The opinion of the District Court for the District of Connecticut (pg. 2a of Appendix to Petition) is reported at 390 F.Supp. 278.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on June 2, 1975 and this petition for certiorari was filed on August 25, 1975 and was granted on December 15, 1975. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Whether, if private individuals prevail against state officials in a suit under Title VII of the Civil Rights Act of 1964,

as amended, by the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e et seq., the Eleventh Amendment bars an award to those plaintiffs of reasonable attorneys' fees as a part of the costs.

Does the Eleventh Amendment to the Constitution of the United States of America prohibit the award of attorneys' fees against the defendants, Chairman of the State Employees' Retirement Commission, Treasurer of the State and Comptroller of the State, since these fees are to be paid out of the State Treasury?

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT XI

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuteed against one of the United States by the Gitizens of another state or by Citizens or Subjects of any Foreign State.

STATEMENT OF THE CASE

The Connecticut State Employees' Retirement Act granted to women employees having 25 or more years of state service the right to retire with pension rights five years earlier than men with identical service qualifications, so that women could retire at age 50, while men were not permitted to retire until age 55. The Retirement Act also contained provisions described as discriminatory rate differentials which favor female employees over male employees, who have worked less than 25 years. These laws authorized reduced retirement benefits to employees who were separated from state employment before they were normally eligible to retire, based upon the aforesaid preferred age differentials.

This suit was instituted as a class action in behalf of all "male" state employees or former state employees who were members of the Connecticut State Employees' Retirement system. The suit not only asserted equal protection claims under the Fourteenth Amendment to the Constitution of the United States, but also asserted statutory violations under the Civil Rights Act of 1871, 42 U.S.C. § 1983. The plaintiffs sought both declaratory and injunctive relief. A three-judge court was convened to hear the case pursuant to 28 U.S.C. §§ 2281 and 2284. On October 15, 1973, plaintiffs amended their complaint to add a count alleging that the Retirement Act violated Title VII of the 1964 Civil Rights Act, 42 U.S.C. §§ 2000e, et seq. Title VII originally did not apply to state governments, but had been amended effective March 24, 1972 to include the state governments within its scope. The case was then remanded to Chief Judge Clarie, sitting as a single district judge for resolution of the claims pursuant to 28 U.S.C. § 2281. Judge Clarie determined that the State Employees' Retirement Act violates Title VII insofar as it discriminates in favor of women in the computation of retirement benefits. The defendants did not appeal from the District Court's ruling that the Retirement Act violates Title VII. Neither did the defendants appeal from the order which prohibited future payments from the Retirement Fund or from other state monies under the Retirement System in a manner which would discriminate against men on the basis of sex. The plaintiffs had also sought to have the retirement benefits for all living retired male employees recalculated retroactively and had also claimed attorneys' fees and costs. Chief Judge Clarie held that the Eleventh Amendment to the Constitution of the United States barred a retroactive money judgment that would be paid by state funds. He also declined to grant attorneys' fees and costs. The plaintiffs appealed from Judge Clarie's ruling. The United States Court of Appeals for the Second Circuit upheld Chief Judge Clarie's rulings that the district court could not grant retroactive damages against the State of Connecticut, but that

the district court could grant prospective injunctive relief against state officers. The Court of Appeals differed with Chief Judge Clarie's ruling on attorneys' fees and remanded "the case to the district court for the purpose of determining in its sound discretion whether an award of attorneys' fees is appropriate and, if so, the amount that may reasonably be awarded."

As a result of Judge Clarie's decision, as affirmed, the Connecticut General Assembly removed, in 1975, the discriminatory age and rate differentials based on sex. P. A. 75-531.

SUMMARY OF ARGUMENT

This Court, in *Edelman* v. *Jordan*, 415 U.S. 651, 94 S. Ct. 1347 (1974), has affirmed the principle that the Eleventh Amendment prohibits a federal court from awarding damages against an unconsenting state as an unconstitutional interference in the monetary affairs of a state. *Edelman* has been cited by courts of appeal as authority for the awarding of attorneys' fees and as authority for the denial of attorneys' fees.

An award of attorneys' fees cannot be considered to be an incidental part of an order granting injunctive relief. This Court did not intend that the necessary monetary consequences of injunctive relief be extended to include the payment of attorneys' fees.

The State of Connecticut had never waived its immunity under the Eleventh Amendment. Such a waiver would require a deliberate and express action on the part of the State of Connecticut. This Court has ruled that the surrender of constitutional rights will not be constructively construed from actions of the state, but such waiver must be clearly expressed. *Murray* v. *Wilson Distilling Co.*, 213 U.S. 151, 29 S.Ct. 458 (1909).

For a federal court to award attorneys' fees where a state has not made provision for the payment of attorneys' fees, is

to order a state official to misappropriate his agency's funds in order to avoid a contempt citation. There can be no payment of funds from the state treasury unless an appropriate statutory or budgetary provision has been made for expenditure.

ARGUMENT

EDELMAN v. JORDAN DOES NOT PERMIT RECOVERY OF ATTORNEYS' FEES AS A PERMISSIBLE ANCILLARY EFFECT.

The United States Court of Appeals for the Second Circuit, in ruling on this case, said that attorneys' fees may be assessed as having a permissible ancillary effect on the state treasury. However, it is our contention that awarding attorneys' fees, in this case, is not merely a subordinate or auxiliary part of the orders issued.

The United States Court of Appeals for the Second Circuit in quoting this Court stated that this Court has characterized "ancillary effect on the state treasury" as a "permissible and often inevitable consequence of the principle announced in Ex Parte Young . . ." *Edelman* v. *Jordan*, 415 U.S. 651, 668, 94 S.Ct. 1347, 1358 (1974).

The Court below did not choose to quote the entire expression of the thinking of the United States Supreme Court and in so doing has chosen to grant a different meaning to an emerging principle than conceivably was intended by this Court.

In *Edelman* v. *Jordan*, *supra*, the Court's pertinent statement in full, was:

> "But the fiscal consequences to state treasuries in these cases were the necessary result of compliance with decrees which by their terms were prospective in nature.

> State officials, in order to shape their official conduct to the mandate of the court's decrees, would more likely have to spend money from the state treasury than if they had been left free to pursue their previous course of conduct. Such an ancillary effect on the state treasury is a permissible and often an inevitable consequence of the principle announced in Ex Parte Young, supra." *Supra*, at 668-669, 94 S. Ct. 1358.

It is our belief that this Court in *Edelman* was stating that in ordering a state official to comply with the requirements of the constitution, it may be possible that the state official may also have to order that money be paid out of the state's treasury. That there happens to be a need to pay out money as a necessary and inevitable consequence of complying with the main impact of the court's order, that payment in those limited cases is the subordinate or ancillary effect of the order.

An example of such an order and its inevitable financial consequence would be a judgment which states that an employee should be reinstated to his position. However, as a result of reinstating the employee, it will be necessary to pay salary for the services which the employee renders in the future. This payment of the salary would be the inevitable financial consequence of the order. To then order the payment of attorneys' fees would not be a natural and inevitable consequence of reemploying the wronged individual.

We do not believe that the courts may, in the course of issuing an appropriately correct judgment, decide that in each and every case they may order the states to pay attorneys' fees by merely stating that the awarding of attorneys' fees is a subordinate and insignificant part of this order.

This Court has stated a principle which several of the courts of appeal refused to read and interpret correctly. They apparently believe that in arriving at any correct judgment

and order, whether or not such order can affect a state treasury, that they may append an order requiring a state to pay attorneys' fees and declare this order to be merely ancillary in its effect.

Courts of appeal in several circuits have arrived at the conclusion that language in *Edelman* permits the awarding of attorneys' fees against the state. In *Souza* v. *Travisono*, 512 F.2d 1137 (1st Cir. 1975), *Class* v. *Norton*, 505 F.2d 123 (2nd Cir. 1974) and *Jordan* v. *Fusari*, 496 F.2d 646 (2nd Cir. 1974) these courts upheld the awarding of attorneys' fees as having a permissible "ancillary effect on the state treasury" resulting from compliance with the granting of injunctive relief. These courts did not deny that the attorneys' fees must be paid out of the state treasury, but rather they believed that the amounts awarded would only have a minimal effect upon the financial condition of the states, as well as being a necessary result of awarding injunctive relief.

Other courts of appeal have disagreed with this reading of *Edelman*. The Third, Fifth and Sixth Courts of Appeal have thus disagreed with the aforementioned courts of appeal. In *Skehan* v. *Board of Trustees of Bloomsburg State College*, 501 F.2d 31, 42 (3rd Cir. 1974), vacated and remanded 421 U.S. 983, 95 S.Ct. 1986 (1975), that Court held:

> "Edelman, while not ruling on the matter specifically, appears to bar the award of attorneys' fees from the state treasury as well."

The Court further opined:

> "We think Edelman must be read as closing the door on any money award from a state treasury in any category." *Supra*, at 42-43, n. 7.

In *Jordan* v. *Gilligan*, 500 F.2d 701, 704-705 (6th Cir. 1974), cert. den. 421 U.S. 991, 95 S.Ct. 1996 (1975) the Court

of Appeals for the Sixth Circuit held that "[a]ny award of attorneys' fees whether against the State of Ohio or its officials, vitally affects the rights and interests of the state in preserving its revenues.", and at page 709, the Court concluded "the Eleventh Amendment prohibits the awarding of attorneys' fees against unconsenting sovereign states." Accord, *Taylor* v. *Perini*, 503 F.2d 899 (6th Cir. 1974), vacated on other grounds, 421 U.S. 982, 95 S.Ct. 1985 (1975); *Named Individual Members* v. *Texas Highway Department*, 496 F.2d 1017 (5th Cir. 1974).

It might be said that some of the courts of appeal have held that the awarding of attorneys' fees is tantamount to awarding retroactive money damages against a sovereign state, while those courts of appeal holding the opposite opinion believe that the awarding of attorneys' fees is part and parcel of the equitable relief provided by injunction.

An order to pay attorneys' fees is a distinct and separate order, completely separate and apart from the order in the main and intended part of the case. Including the order for the payment of attorneys' fees within the same sentence as the main order does not reduce the attorneys' fees to an ancillary part of the order. No tricks of semantics or self delusion that because the amount of the attorneys' fees is a very small sum makes it a necessary consequence of the order. The order for the payment of attorneys' fees might be likened to the small and insignificant tip of the iceberg visible above the surface of the water. Judge Clarie expressed it clearly when he stated:

> "While the amount sought in this case is not prohibitive, once the floodgates are opened, adequate control no longer prevails." *Fitzpatrick* v. *Bitzer*, 390 F.Supp. 278, 289 (D. Conn. 1974), aff'd in part, rev'd in part, and remanded 519 F.2d 559 (2d Cir. 1975).

THERE ARE NO STATE FUNDS AVAILABLE FOR PAYMENT OF ATTORNEYS' FEES UNLESS THEY ARE SPECIFICALLY INCLUDED IN THE STATE BUDGET.

Attorneys' fees to be paid a state do not come from some vast, anonymous monolith. The attorneys' fees come from the pockets of the taxpayers.

In light of recent headlines, it is easy to fall prey to the all too common idea that the government is a huge bottomless pocket and no one will ever miss this miserly sum. This is a time when some citizens have become almost impervious to cries of mishandling of government funds. Deliberate deceptions practiced by administrative agencies to avoid the intended impact of corrective legislation are common national headlines. A sign of our times seems to be frequently used expressions that the government can afford it, the government will never miss it.

Connecticut being one of the smallest states provides an excellent laboratory to illustrate that every dollar must come from a taxpayer's pocket and that no money is available to a state agency unless it is provided in the state budget. See § 4-97, Conn. Gen. Stat., as amended.

Once a taxpayer has paid his taxes into the state coffers, it does not disappear into a vast maw to be expended at the mere whim of state officials in fanciful unauthorized projects.

In Connecticut, each state agency's proposed budget for the coming fiscal year is presented to the state legislature for its consideration. § 4-71, Conn. Gen. Stat., as amended. In those areas in which the State of Connecticut has not waived its sovereign immunity, no state agency is granted funds to pay damages or attorneys' fees. A state agency which does not have the statutory authority to pay damages or attorneys' fees

cannot include such a request in its budgetary request for money. No request having been made, no money is allocated, none is available to pay damages or attorneys' fees. §§ 4-97, 4-97a, Conn. Gen. Stat., as amended.

There are, of course, certain statutory provisions permiting the head of a state agency to make limited, minor changes in the items he may purchase with the funds allocated to his agency. § 4-94, Conn. Gen. Stat., as amended.

The State Comptroller, in fulfilling his statutory duties, cannot make a decision to pay court ordered attorneys' fees out of an agency's budget on a theory that maybe it was a legislative oversight. Neither can he issue his warrant to the State Treasurer directing him to dip into the state's general fund and issue a check in payment of the attorneys' fees.

In times of economic distress, a state will, in many instances, discover a shortfall between anticipated income and income actually received. Under those deficit circumstances, there are insufficient funds in the state treasury to give each agency the money allocated to it by the budget. Now, at the direction of the Governor, each agency cuts back on its proposed spending. § 4-85, Conn. Gen. Stat., as amended. Projects are discontinued and disaster strikes the state employees, some are laid off to effect the needed economies. See, e.g., §§ 3-6, 5-241, Conn. Gen. Stat., as amended.

Now, if a court were to order a state agency to pay attorneys' fees at this time, where would the money come from? Should more employees be laid off to provide the fees? If, perchance, the order was to the Department on Aging maybe the only way to avoid a contempt citation is to take money from "meals on wheels" which provides hot meals to shut-in senior citizens.

Money with which to pay unbudgeted attorneys' fees is not included in any state agency's budget. Even if, on the day of this writing, there had been a budgetary surplus instead of a deficit, even if it had not been necessary for the Governor of the State to announce the necessity of closing Cedarcrest Hospital and the laying off of over one hundred seventy employees, even if we had a surplus of millions, unless provision is made for a payment in its budget, a state agency has no authority to make an expenditure of state funds. § 4-97, Conn. Gen. Stat., as amended; see also § 4-92, Conn. Gen. Stat., as amended.

The Governor's office has a relatively small contingency fund with which to meet emergencies. § 4-84, Conn. Gen. Stat., as amended. Assuming *arguendo* that the payment of attorneys' fees may be deemed an "emergency" within the purview of the statute, this $100,000.00 contingency fund would not permit the payment of attorneys' fees in many cases.

THE STATE OF CONNECTICUT HAS NOT WAIVED ITS IMMUNITY UNDER THE ELEVENTH AMENDMENT.

The Constitution of the State of Connecticut, Eleventh Article, Section 4, states:

> "Claims against the state shall be resolved in such manner as may be provided by law."

It cannot be argued that this constitutional provision is a waiver of the Eleventh Amendment to the Constitution of the United States. It grants the General Assembly of the State of Connecticut the authority to determine if, when and how claims against the state shall be made.

The General Assembly has adopted several statutes which permit the institution of actions against the state or against certain state officials. None of these statutes is applicable in the matter presently before the Court.

One of the areas in which claims against the State of Connecticut may be resolved is set forth in Chapter 53 of the Connecticut General Statutes entitled "Claims Against The State". This statute specifically excludes "claims for the periodic payment of disability, pension, retirement or other employment benefits."

The cause of action now before this court was based upon certain claims for retirement benefits. The statute authorizing the appointment of the Claims Commissioner for the State of Connecticut specifically excludes the consideration of claims concerning retirement benefits from the jurisdiction of the Claims Commissioner.

The deliberate exclusion of this area from the jurisdiction of the official empowered to hear claims and to authorize the institution of actions against the state, must be considered to be a positive refusal by the state to waive its immunity in all areas not specifically waived by the statute.

Assuming even that the passage of Chapter 53 of the Connecticut General Statutes does not serve to state that the State of Connecticut has not waived its Eleventh Amendment immunity, it is not necessary for a state legislature to pass a statute or resolution which will specifically cry out "Know Ye All Men by these presents that the State of Connecticut does hereby refuse to waive its immunity under the Eleventh Amendment of the Constitution of the United States of America."

It is almost axiomatic that in the construction of statutes a state agency has no authority other than that granted it by

statute or by necessary implication. It follows that the actions of the state are read in its statutes or by necessary implication. Thus, a state legislature must speak in the clearest of terms when the decision is being made to waive the immunity of the state.

A waiver must not only be clearly intended as a waiver, but there must be an appropriation of funds to implement the waiver. Any waiver of Eleventh Amendment immunity without an appropriation to permit the payments involved is an incomplete act and should not be considered as an absolute waiver.

This Court has stated that in determining whether a state has waived its constitutional protection under the Eleventh Amendment, it would require that the waiver be in the clearest possible language and that it would not adopt a ruling by which it is found that a state constructively consented to the institution of a suit.

> ". . . Constructive consent is not a doctrine commonly associated with the surrender of constitutional rights, and we see no place for it here. In deciding whether a state has waived its constitutional protection under the Eleventh Amendment we will find waiver only where stated 'by the most express language or by such overwhelming implications from the text as will leave no room for any other reasonable construction.' Murray v. Wilson Distilling Co., 213 U.S. 151, 171, 29 S.Ct. 458, 464 53 L.Ed. 742 (1909). We see no reason to retreat from the Court's statement in Great Northern Insurance Co. v. Read, 322 U.S. 47, 54, 64 S.Ct. 873, 877, 88 L.Ed. 1121 (1945) (footnote omitted). '[W]hen we are dealing with the sovereign exemption from judicial interference in the vital field of financial administration a clear declaration of the state's intention to submit its fiscal problems to other courts than those of its own creation must be

found.' " *Edelman* v. *Jordan*, 415 U.S. 651, 673, 94 S.Ct. 1347, 1360.

Chapter 53, Connecticut General Statutes, does not state that the State of Connecticut consents to suit in the federal courts. There is no statutory indication that Connecticut has waived its right to raise the protection of the Eleventh Amendment. Chapter 53 provides a procedure for obtaining authorization to sue the state in the state courts only.

This Court has held that even in those cases where a state has specifically waived its sovereign immunity and consented to suit by its own citizens that the Eleventh Amendment has not been waived without a clear showing that the state consented to the suit. *Smith* v. *Reeves*, 178 U.S. 436, 20 S.Ct. 919 (1899); *Chandler* v. *Dix*, 194 U.S. 590, 24 S.Ct. 766 (1903); *Great Northern Life Insurance Co.* v. *Read*, 322 U.S. 47, 64 S.Ct. 873 (1944). See also, *Richin* v. *Industrial Construction Inc.*, 502 F.2d 1051, 1055 (10th Cir. 1974).

The fact that when the State of Connecticut deems it appropriate it waives its sovereign immunity "by the most express language" is admirably demonstrated by § 52-556, Connecticut General Statutes, which states:

> "Any person injured in person or property through the negligence of any state official or employee when operating a motor vehicle owned and insured by the state against personal injuries or property damage shall have a right of action against the state to recover damages for such injury."

There is no Connecticut General Statute or Resolution of the State Legislature stating that the State of Connecticut has waived its immunity under the Eleventh Amendment of the Constitution of the United States.

The only ways in which the State of Connecticut could waive its Eleventh Amendment immunity would be by the passage of a statute or by an amendment to the State Constitution. No such waiver exists.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court below concerning the payment of attorneys' fees should be reversed.

Respectfully submitted,

CARL R. AJELLO
Attorney General

BERNARD F. MCGOVERN, JR.
Assistant Attorney General

SIDNEY D. GIBER
Assistant Attorney General

Attorneys for Petitioners

Supreme Court, U.S.
FILED
MAR 10 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-283

FREDERICK BITZER, ET AL.,
Petitioners,

v.

DONALD MATTHEWS, ET AL.,
Respondents.

BRIEF FOR RESPONDENTS

PAUL W. ORTH
AUSTIN CAREY, JR. of
HOPPIN, CAREY & POWELL
266 Pearl Street
Hartford, Connecticut 06103

EDWARD GALLANT
760 Capitol Avenue
Hartford, Connecticut 06106
Counsel for Respondents

INDEX

PAGE

Introduction and Summary of Argument 1

Argument:

I. An award of attorneys' fees to "Private Attorneys General" in Title VII litigation has been specifically authorized by Congress and recognized by this Court as vital to private enforcement of Federal laws of highest national priority 4

II. Edelman v. Jordan does not preclude an award of statutory attorneys' fees; rather its principles uphold them as necessary to secure compliance with Federal law 6

III. There is no jurisdictional bar to an award of fees against the state, especially where the fees are made costs by Federal statute and are necessary to Court control of litigants' conduct 13

Conclusion 16

TABLE OF AUTHORITIES

CASES — Page

Albemarle Paper Company v. Moody, 422 U.S. 405 (1975) 3, 4, 5

Alyeska Pipeline Service Co. v. The Wilderness Society, 421 U.S. 240 (1975) 4, 5, 6, 7, 8, 10, 11

Boston Chapter N.A.A.C.P., Inc. v. Beecher, 504 F.2d 1017 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975) 14

Bradley v. School Board of the City of Richmond, 416 U.S. 696 (1974) 13

Carey v. White, — F. Supp. —, 44 U.S. L. W. 2338 (D. Del., Jan. 6, 1976) 8

Class v. Norton, 505 F.2d 123 (2d Cir. 1974) 11

Edelman v. Jordan, 415 U.S. 651, *reh. denied*, 416 U.S. 1000 (1974) 3, 6, 7, 8, 9, 10, 11, 13, 14

Employees v. Department of Public Health and Welfare, 411 U.S. 279 (1973) (dissent) 8

Ex parte Young, 209 U.S. 123 (1908) 1, 9, 12, 13

Fairmont Creamery Co. v. Minnesota, 275 U.S. 70 (1927) 14

Ford Motor Co. v. Department of Treasury, 323 U.S. 459 (1945) 9

Gates v. Collier, 489 F.2d 298 (5th Cir. 1973), *vacated and remanded*, 522 F.2d 81, (5th Cir. *en banc*, 1975); *on remand*, No. GC 71-6-K (N.D. Miss. Feb. 3, 1976) 7

Hans v. Louisiana, 134 U.S. 1 (1890) 8

Jordon v. Gilligan, 500 F.2d 701 (6th Cir. 1974), *cert. denied*, 421 U.S. 991 (1975) 7

Mauclet v. Nyquist, Civ. 75-73 (WDNY, Feb. 11, 1976) .. 12

Milburn v. Huecker, 500 F.2d 1279 (6th Cir. 1974) 7

CASES Page

Named Individual Members of the San Antonio Conservation Society v. Texas Highway Dept., 496 F.2d 1017 (5th Cir. 1974); *cert. denied*, 420 U.S. 926 (1975); *aff'd* (5th Cir. *en banc*, Sept. 25, 1975) 7, 8

Newman v. Piggie Park Enterprises, 309 U.S. 400 (1968) 4, 5

Newman v. State of Alabama, 503 F.2d 1320 (5th Cir. 1974), *cert. denied*, 421 U.S. 948; *vacated and remanded*, 522 F.2d 71 (5th Cir. *en banc*, 1975) 7, 10, 11

Northcross v. Board of Education, 412 U.S. 427 (1973) .. 4

Rabinovitch v. Nyquist, Civ. 74-1142 (E.D. N.Y., Feb. 11, 1976) 12

Rodriguez v. Swank, 496 F.2d 1110 (7th Cir.), *cert. denied*, 419 U.S. 885 (1974) 11

Skehan v. Trustees of Bloomsburg State College, 501 F.2d 31 (3d Cir. 1974), *vacated and remanded*, 421 U.S. 983 (1975) 7, 8

Souza v. Travisono, 512 F.2d 1137 (1st Cir. 1975), *vacated and remanded*, 96 S. Ct. 19 14

Taylor v. Perini, 503 F.2d 899 (6th Cir. 1974), *vacated and remanded*, 421 U.S. 983 (1975) 7, 8

Thonen v. Jenkins, 517 F.2d 3 (4th Cir. 1975) 8, 14

CONSTITUTIONAL AND STATUTORY PROVISIONS

Page

United States Constitution:

Commerce Clause 2, 8

Article III 8

Amendment XI ..... *passim*

Amendment XIV, Sec. 5 ..... *passim*

Federal Statutes:

Title II of the Civil Rights Act of 1964 ..... 4, 5

Title VII of the Civil Rights Act of 1964 ..... 1, 2

Emergency School Aid Act of 1972 4

Fair Labor Standards Act Amendments of 1974 8

42 U.S.C. § 2000e-5(f)(i) 5

42 U.S.C. § 2000e-5(g) 5

42 U.S.C. § 2000e-5(k) 4, 14

OTHER AUTHORITIES

Cullison, *Interpretation of the Eleventh Amendment*, 5 Houston L. Rev. 1 (1967) 8

Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 Colo. L. Rev. 1 (1972) 8

Note, *Attorneys' Fees and the Eleventh Amendment*, 88 Harv. L. Rev. 1875 (June 1975) 5, 8, 10, 11, 14

Note, *Awarding Attorneys' Fees Against a State Official Sued in His Official Capacity after "Edelman v. Jordan"*, 55 B.U. L. Rev. 228 (March 1975) 6, 10, 11, 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-283

FREDERICK BITZER, ET AL.,

Petitioners,

v.

DONALD MATTHEWS, ET AL.,

Respondents.

BRIEF FOR RESPONDENTS

INTRODUCTION AND SUMMARY OF ARGUMENT

In this case and its companion, No. 75-251, the essential question is whether Congress has the power to extend all the remedies of the Civil Rights Act of 1964 to state employers. There is no doubt that the Attorney General could obtain the back pay relief sought. There is no doubt that Congress clearly intended to authorize private suits by individuals against state employers and to afford them all relief necessary to end employment discrimination. There is no attack in this case upon the power of individual employees to bring this suit under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), and to obtain from the federal court the injunctive relief necessary to end discrimination *together with* the considerable monetary consequences to Connecticut's retirement fund such injunctive relief entails. On behalf of the State, however, it is claimed that the Eleventh Amendment constitutes a jurisdictional bar to any other monetary "award" and that concern for the state fisc prevents any monetary award no matter how intertwined with the injunctive relief given and no matter how necessary to achieve such relief or to afford complete relief. The practical fear of the states

which led to the adoption of the Eleventh Amendment over 175 years ago — that they not be sued for their ordinary debts in federal courts by individuals — is being escalated towards subversion of aspects of Congressional legislation passed under both the Commerce Clause and Section 5 of the Fourteenth Amendment. In ratifying the Constitution and then the Reconstruction Amendments, the states surrendered portions of their sovereignty incompatible with those powers delegated to the federal government and executed by reasonable Congressional legislation.

When Title VII of the 1964 Civil Rights Act was amended in 1972 to include states, Congress recognized that the resources and efforts of the Attorney General were limited and that private suits were of paramount importance. Congress mandated that federal courts should for successful litigants tailor an affirmative, multifaceted, equitable remedy — and also award attorneys' fees. Congress knew, and this Court has recognized, that back pay and attorneys' fees were part of the total remedy necessary to eradicate discrimination and to deter employer delay and obstinancy. This nation's great goal of equal opportunity cannot be realized if multitudes of victims of discriminatory employment practices by supposedly benevolent state employers are not afforded the remedies indispensable to protect their rights. The Eleventh Amendment was not intended to cover monetary relief welded to the fulfillment of this national goal; but in any event — due to precedent, history, and policy — it must give way in areas of conflict with legislation implementing basic Fourteenth Amendment protections. The awards respondents seek do not threaten state sovereignty and are consistent with harmonious federalism in a modern society committed to ending discrimination.

We have said the foregoing in substance in our back pay brief in No. 75-251, and have also added to it the inappropriateness of any requirement that the state affirmatively "waive" any Eleventh Amendment immunity — even though strong indicia of waiver exist in this case. In this brief we therefore take a more limited (but still related) approach in seeking to uphold only an award of attorneys' fees against a state employer found to have engaged in forbidden discrimination. Such an award has a private attorney general rationale but was authorized for good and

sufficient reason by Congress. Such award, like back pay, is part of the remedial complex necessary to vindicate national policy of the highest priority. The strong national commitment to equal employment opportunity is reflected in this Court's express holding that an award of attorneys' fees to a successful plaintiff is required in Title VII cases in all but very unusual circumstances. *Albemarle Paper Company v. Moody*, 422 U.S. 405, 415 (1975). *Albemarle* would be dispositive of petitioners' claims, but for the Eleventh Amendment and the fact that the employer here was the State of Connecticut. The Eleventh Amendment does not, however, dictate a different result than that reached in *Albemarle*.

An award of attorneys' fees is different in both its underlying premises and its consequences from a monetary award of the kind foreclosed by *Edelman v. Jordan*, 415 U.S. 651 (1974). Attorneys' fees represent neither compensation for the prevailing party nor an accrued monetary liability. They arise out of litigation over which the federal courts have exclusive jurisdiction, and they have a prospective thrust and are necessary to achieve compliance with federal law. The power of the federal courts to award attorneys' fees to the prevailing party is an essential element of the remedial pattern of Title VII without which those courts will experience substantial difficulty in enforcing policies to which Congress has assigned the highest priority.

In addition to being consistent with *Edelman's* principles, a fee award does not come within its jurisdictional bar to awards of retroactive monetary damages. Such an award is not a separate cause of action but, like costs, is ancillary to or an incident of the court's decision. Congress has by statute reasonably made fees a part of costs, and costs are routinely awarded against states engaged in federal litigation. They are appropriate to control the conduct of the parties before the court and to foster the orderly administration of justice. Here the "sovereign" did not do right; instead it delayed corrective legislation until after the district court's injunctive decree. Moreover, there is now no suggestion by the State that it will voluntarily restore to the respondents either the expenses they incurred in eliminating discrimination in the State's retirement laws or the

benefits of which respondents were wrongfully deprived. The response of the State has been limited to an exaggerated concern for the preservation of its treasury, and in this respect it does not differ from a private employer. Unlike a private employer, however, a state which faces neither the prospect of an award of attorneys' fees nor an award of back pay has no incentive to resolve expeditiously litigation involving issues to which Congress has assigned the highest national priority. As this Court observed in *Albemarle Paper Company v. Moody*, 422 U.S. at 417, "If employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality".

ARGUMENT

I. An award of attorneys' fees to "Private Attorneys General" in Title VII litigation has been specifically authorized by Congress and recognized by this Court as vital to private enforcement of Federal laws of highest national priority.

That section of Title VII pertaining to attorneys' fees provides in pertinent part: ". . . the court, in its discretion, may allow the prevailing party . . . . a reasonable attorney's fee as part of the costs . . .". 42 U. S. C. § 2000e-5 (k). In a series of cases this Court has construed such language to require an award of attorneys' fees to a successful plaintiff "absent exceptional circumstances". *Newman v. Piggie Park Enterprises*, 309 U. S. 400, 402 (1968) (Title II of the Civil Rights Act of 1964); *Northcross v. Board of Education*, 412 U. S. 427, 428 (1973) (Emergency School Aid Act of 1972); *Albemarle Paper Company v. Moody*, 422 U. S. 405, 415 (1975) (Title VII). *Albemarle Paper Company* would completely dispose of the attorneys' fees issue here but for the fact that the employer here was the State of Connecticut. Petitioners, and *amici* in their support, argue that the Eleventh Amendment alters the result mandated in *Albemarle*. It does not.

Shortly before its decision in *Albemarle*, this Court held in *Alyeska Pipeline Service Co. v. The Wilderness Society*, 421 U.S. 240 (1975), that, absent explicit statutory authorization, federal courts do not have the power to award attorneys' fees under the private attorney general theory. Repeatedly Mr. Justice White for the majority stressed that the redistribution of

litigation costs was in the province of the legislature. The history of cost and fee legislation was reviewed, and specific examples were given of explicit provisions for attorneys' fees "under selected statutes granting or protecting federal rights". A preeminent example was the discretionary fee provision under Title II of the Civil Rights Act of 1964 as construed in *Newman v. Piggie Park Enterprises, supra,* and it was noted that Title II was intended, "not simply to penalize litigants who deliberately advance arguments they know to be untenable but, more broadly, to encourage individuals injured by racial discrimination to seek judicial relief under Title II" (and to vindicate a policy "that Congress considered of the highest priority"). 421 U.S. at 262.

Although in *Alyeska* the Court "had no occasion to address" the question of the permissibility under the Eleventh Amendment of an award against a state government (*id.* at 269, n. 44), awards of attorneys' fees, like back pay, are essential to the private enforceability of Title VII. See respondents' brief as petitioners in the companion matter, No. 75-251, pp. 22-24 (hereafter brief in 251). In a case like this or one involving discriminatory "fringe benefits" or pay differentials, the prospect of attorneys' fee awards may be even more important than any monetary aspects of the affirmative, equitable relief Congress provided in 42 U.S.C. § 2000e-5 (g). In any event, Congress has clearly spoken, and the reasons and policies underlying such awards are as strong as could be found under any private attorney general rationale. Here, in effect, 42 U.S.C. § 2000e-5 (f) (1) has constituted respondents as *statutory* private attorneys general.

Turning to the Eleventh Amendment aspect, the close connection between attorneys' fees and back pay is shown in a Note, *Attorneys' Fees and the Eleventh Amendment,* 88 Harv. L. Rev. 1875 (June 1975), (hereafter Note 88 Harv.), which takes some of the approaches of our brief in 251. This Note concludes at 1901 that Congress' power to resolve this problem of federalism is appropriate and that Congress be permitted to authorize fee awards in cases such as the one at bar. Fees and back pay as mandated by Congress are *both* necessary to fully enforce Title VII against states which engage in discrimination. Denial of both on Eleventh Amendment grounds would devastate the

private actions deemed so essential by Congress and this Court to the enforcement of Title VII. If this Court agrees with our position in 251 on back pay, then the applicability of the fee provisions should follow, *a fortiori*, under *Albemarle Paper Company*.

If this Court, like the Second Circuit, is inclined to disagree with us on back pay, we would urge a consideration of any essential differences in nature, purpose, and effect between fees and back pay in respect to the Eleventh Amendment, Congressional enforcement of the Fourteenth Amendment, and the attendant concerns for federalism and civil rights. Therefore, in this brief we note only the clear Congressional authorization of fees and the crucial need for such awards, and we maintain there are no "exceptional circumstances" allowing fees to be denied. We rely on our brief in 251 to present those points and authorities applicable to both back pay and attorneys' fees. Accordingly, we now turn to those special considerations concerning fees which should in any event allow them to survive an Eleventh Amendment attack.

II. Edelman v. Jordan does not preclude an award of statutory attorneys' fees; rather its principles uphold them as necessary to secure compliance with Federal law.

A. Conflict among the Circuits:

The court below (App. 47a) allowed an attorneys' fee award as a permissible "ancillary effect" under *Edelman v. Jordan*, 415 U.S. 651, 667-68 (1974). Other circuits have looked to *Edelman* for guidance and have came to contradictory conclusions as noted in *Alyeska*, 421 U.S. at 269, n. 44; see also 270 n. 46. A comprehensive law review note concludes that the specific *Edelman* holding neither bars nor authorizes the award, that the question should be resolved within its analytical framework, and that under such analysis the Eleventh Amendment does not bar an award of attorneys' fees against a state official sued in his official capacity. See Note, *Awarding Attorneys' Fees Against a State Official Sued in His Official Capacity after "Edelman v. Jordan"*, 55 B.U. L. Rev. 228, 229-30, 241-42 (March 1975), (hereafter Note 55 B.U.). *Alyeska* does not affect the thesis of this Note.

What *Alyeska* did do was obviate the necessity of further consideration of those cases from circuits other than the Second on which state officials here rely and where fees not based on statutory authority were denied. It also left the decision of the Second Circuit as the only Court of Appeals precedent concerning fees authorized in Title VII by Congress. With respect to decisions in other circuits: *Jordon v. Gilligan*, 500 F.2d 701 (6th Cir. 1974), conflicted with a contemporaneous decision of another panel of the Sixth Circuit in *Milburn v. Huecker*, 500 F.2d 1279 (6th Cir. 1974). This conflict was resolved in *Taylor v. Perini*, 503 F.2d 899 (6th Cir. 1974) which then became "the ultimate position of [the Sixth] Circuit", 503 F.2d at 912 (dissent). On May 27, 1975, *Taylor v. Perini* was vacated and remanded for reconsideration in light of *Alyeska*. 421 U.S. 982. On the same date, *Skehan v. Board of Trustees of Bloomsburg State College*, 501 F.2d 31 (3d Cir. 1974), was also vacated and remanded with a similar instruction for reconsideration. 421 U.S. 983. Since both cases appear to be controlled by *Alyeska*, further consideration of the Eleventh Amendment issue in *Taylor* and *Skehan* has probably been obviated. Although a petition for writ of certiorari was denied *sub nom Gilligan v. Jordan*, 421 U.S. 991 (1975), that decision, as was noted above, was not the "ultimate position" of the Sixth Circuit on the Eleventh Amendment issue.

The decision of the Fifth Circuit cited by the petitioners, *Named Individual Members of the San Antonio Conservation Society v. Texas Highway Dept.*, 496 F.2d 1017 (5th Cir. 1974), *cert. denied*, 420 U.S. 926 (1975), was in direct conflict with a decision of another panel in that Circuit, *Gates v. Collier*, 489 F.2d 298 (5th Cir. 1973). In order to resolve this conflict, a consolidated hearing, *en banc*, was ordered for *Gates*, *Named Individual Members of the San Antonio Conservation Society*, and a third case, *Newman v. State of Alabama*, 503 F.2d 1320, at 1321 n.l (1974), *cert. denied*, 421 U.S. 948 (1975). On October 29, 1975, the Fifth Circuit, *en banc*, over strong dissents, vacated and remanded *Gates* and *Newman* for reconsideration in light of the supervening decisions in *Alyeska* and *Edelman*. *Gates v. Collier*, 522 F.2d 81; *Newman v. State of Alabama*, 522 F.2d 71. The denial of attorneys' fees in *Named Individual Members of*

the San Antonio Conservation Society v. Texas Highway Dept., was affirmed on the basis of *Alyeska*. — F.2d — (No. 74-1231, 5th Cir. *en banc*, Sept. 25, 1975). On February 3, 1976, the district court in *Gates v. Collier*, No. GC 71-6-K (ND Miss.) held, on remand, that neither *Alyeska* nor *Edelman* barred an award of $41,750 fees and $10,986.05 costs against the State of Mississippi.

Although there may no longer be any conflict in the narrow sense, however, we cannot conclude that the Third and Sixth Circuits would deviate in any material respects from their conclusions in *Skehan* and *Taylor*. They would rely mainly on the Second Circuit's decision regarding back pay in order to bar recovery of both back pay *and* attorneys' fees from state treasuries. That there is a conflict in the underlying reasoning of the several circuits on the meaning of *Edelman* cannot be questioned. See further, *Thonen v. Jenkins*, 517 F.2d 3, 7 (4th Cir. 1975); Note 88 Harv. 1975, 1876, 1889. Thus *Edelman* also must be further analyzed.[1]

---

1. This analysis should not imply our acceptance that the Eleventh Amendment, *Edelman*, and especially *Hans v. Louisiana*, 134 U.S. 1 (1890), apply in this case to require "waiver". The *amici* brief of The Lawyers Committee for Civil Rights Under Law *et al* in 251 cogently argues that Article III conferred federal judicial power over federal question claims against states by individuals, that the Eleventh Amendment did not withdraw that power, and that the broad declaration in *Hans* that Congress lacks power to confer federal jurisdiction over federal question suits against states was unfaithful to historical and judicial precedents — and was later made inapplicable when Congress acting under the Commerce Clause expressly conferred federal question jurisdiction over states. A strong and thought-provoking critique of *Hans* appears in a comprehensive article, Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 Colo. L. Rev. 1, 28-32, 60-72 (1972). See further, *Employees v. Department of Public Health and Welfare*, 411 U.S. 279, 313 (Brennan, J., dissenting); and Cullison, *Interpretation of the Eleventh Amendment*, 5 Houston L. Rev. 1, 17-35 (1967) (Eleventh should never have been extended to actions to protect federal rights). These views fortify our argument in Section III of our brief in 251 that no state consent is necessary in the face of Congressional legislation enforcing the Fourteenth Amendment. At the very least waiver should readily be found from slight or ongoing state activity affecting federally regulated areas. Recently, a federal court held that Delaware's continuing operation of state mental health institutions after enactment of 1974 Fair Labor Standards Act amendments authorizing individual employees to sue their state employers, constitutes implicit waiver of that state's Eleventh Amendment immunity to federal suits under that "commerce clause" Act. *Carey v. White*, — *F. Supp.* — , 44 U.S. L.W. 2338 (D. Del., Jan. 6, 1976).

B: Edelman analysis supports fees:

As already pointed out in our brief in 251, *Edelman* does not involve Congressional authorization to sue states and does not bar all monetary impact on state treasuries. There are additional aspects of *Edelman* which lead to the conclusion that its principles give no support to fee denial but instead permit statutorily based awards against states in cases like the one at bar.

1. There is only one sentence in *Edelman* that furnishes any support for the broad view that it bars any conceivable monetary award:

> "Thus the rule has evolved that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment." 415 U.S. at 663.

This is not the *Edelman* holding, but rather a summary of three cited cases which involved state statutory tax refund schemes that required judgments in favor of the taxpayers to be paid out of the state treasury. Such refunds are like accrued monetary liability existing at the time suit is commenced and are usually, but not invariably, barred by *Edelman*. They are readily distinguishable from fees. Moreover, these cases did not consider the relevance of *Ex parte Young*, 209 U.S. 123 (1908). *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 464 (1945), did not and could not involve *Ex parte Young*, since an agency of the state itself was sued. (The fiction deemed necessary to the result in *Ex parte Young* could readily have been extended to cover awards against defendant state officials in spite of the probability that payment would ultimately be out of state treasuries.)

2. What *Edelman* essentially prohibited was an award of retroactive welfare benefits which, like an award of damages, was "an accrued monetary liability" — "a form of compensation" — "resulting from a past breach of legal duty" (albeit a duty arising under a regulation rather than derived from the Constitution). 415 U.S. at 664, 668. Fees, however, possess none of these features; they are not an accrued liability at the time of suit, or compensation for same; there is "no separate cause of action", let alone a "third" cause of action, for them. Fees are not measured by the loss resulting from a past breach of legal

duty. Fees are an expense of litigation, and they are usually measured by the reasonable value of services of counsel in asserting plaintiffs' rights. However, time and money are only a partial measure where the purpose of the statutory awards is to induce litigants to vindicate constitutional rights and important public interests. *Newman v. State of Alabama*, 522 F.2d 71, 75 (5th Cir. 1975) (dissent); Notes, 88 Harv. at 1895-96 and 55 B.U. at 233-34.

3. *Edelman* permitted fiscal impact, of even major proportions, where that effect was "a necessary consequence of compliance in the future with a substantive federal question determination . . . . ." 415 U.S. at 668. As we shall shortly demonstrate more fully, fee awards are well within the range of what is permissible under *Edelman*. They are a necessary cost of litigation to obtain an injunction which secures compliance with federal law; and they are necessary to control the conduct of the parties.

4. *Edelman*, moreover, was concerned, at 415 U.S. 666 n. 11, with the assumedly different fiscal consequences between retroactive and prospective relief — a distinction not made in Title VII. This aspect is considered in regard to back pay on page 39 of our brief in 251 and Note 88 Harv. at 1880-82, 1896. Aside from not being "retroactive", fee awards clearly have a minimal fiscal impact. *Newman v. State of Alabama*, 522 F.2d at 75. Predictions of state officials to the contrary are as exaggerated as their budgetary warnings are hollow. (Petitioners' brief, pp. 9-11).

5. Lastly, the right to receive welfare benefits asserted by plaintiffs in *Edelman* does not directly arise from rights given by legislation implementing the equal protection clause of the Fourteenth Amendment. Unlike the right arising under that Amendment and its implementing legislation, the welfare rights involved in *Edelman* were not fundamental rights the enforcement of which Congress has determined to be of the "highest priority". The *statutory* private attorney general concept expressly validated by this Court in *Alyeska*, is the vehicle which Congress, for very substantial reasons, has selected as most appropriate to the enforcement of such fundamental rights.

C. Fees help obtain compliance with federal law:

Turning to the ambit of awards permissible under *Edelman's* standard of securing compliance with federal law, cases from two circuits have demonstrated that awards were essential to ensure future compliance with injunctions previously entered against state officials. In *Rodriguez v. Swank*, 496 F.2d 1110 (7th Cir.), *cert. denied*, 419 U.S. 885 (1974), one hundred dollars was awarded to each future welfare applicant whose application was not timely processed under a prior court order. This was permissible under *Edelman* because "the fiscal consequence to the treasury was the necessary result of attempts to gain compliance with a decree which by its terms was prospective in nature". *Id.* at 1113. This rationale was followed and extended in *Class v. Norton*, 505 F.2d 123 (2d Cir. 1974), which awarded attorneys' fees against a welfare commissioner who was not complying with a prior injunction. Again, the concern was not compensation for loss but guarantee of future compliance. "In finding that the Eleventh Amendment does not immunize the Commissioner from liability in his official capacity, we underline the forward-looking, deterrent nature of this award." *Id.* at 127.

Even assuming that *Class v. Norton* gave a liberal reading to some of *Edelman's* language, the focus on attorneys' fees as a means of achieving future compliance with the law is consistent with the prospective thrust of *Edelman*. The importance in *Edelman* of the federal courts' ability to require future compliance by states should impose on states not only the cost of such compliance *but also the cost of achieving it. Newman v. State of Alabama, supra*, 522 F.2d at 75; Notes, 88 Harv. at 1893-95 and 55 B. U. at 237-241. The court below, in adhering to *Class v. Norton* (App. 47a-48a), readily saw the prospective nature of fee awards, "based on the state's failure in its duty to conform its conduct to federal law and its threatened continuation on the same illegal course in the future".

This statement, and the decision of that court in *Class*, also reflect a "bad faith" element of state conduct present in this case which alone might constitute a separate ground for awarding fees even absent statute. *Alyeska*, 421 U. S. at 258-259; Note 88 Harv. at 1882, 1892. This Court further suggested in *Alyeska*, 421 U.S. at 270, n. 46, that the Eleventh Amendment may not

bar an award of attorneys' fees under the bad faith exception. Although there is no claim that the defendant officials themselves acted in bad faith, we have pointed out in our brief in 251 at pages 25 and 33, and reemphasize here, that in two successive sessions of Connecticut's General Assembly discrimination was not removed from the face of the retirement laws, that only the District Court's order finally ended the *de jure* discrimination, and that then the state officials did not bother to appeal. Most of the claim for recalculated retirement benefits arose in this period of obdurate delay and inaction *after suit was brought*, and thus points up the similarity — and necessity — of both fee and back pay awards. Here, state officials disclaim any fiscal consequence for "toughing it out" in defiance of federal law as long as possible until a federal court acted — an employer tactic Congress correctly foresaw and legislated to discourage.[2]

Fee awards are an appropriate and necessary means for federal courts to regulate the conduct of litigants, especially in suits brought under the *Ex parte Young* doctrine. Is is inequitable for a state to force plaintiffs to engage in unnecessary litigation without any risk of a fee award if its defense is without merit, as was the case here and in other cases. See Note 55 B. U. at 239 and n. 66. In this action, each retired male employee had only a small financial stake but at least had the advantage of a class. In many discrimination cases an individual, often poor and downtrodden, is pitted against state resources and salaried legal talent in potentially complex litigation, with the problems attendant upon payment of his attorney only in the event of final victory. The victim's attorney deserves some tangible reward even where the losing defendant acts "in good faith". Otherwise, private suits will be discouraged, and recalcitrant state employers will be deterred only from prompt compliance with federal law.

---

2. Recently, a three-judge district court found certain provisions of the New York Education Law unconstitutional as discriminating against two resident aliens, ordered defendant state officials to process the pending tuition assistance application of one and requalify the other for a scholarship *as of the dates suits were started*, and then said that *Edelman* did not allow any award of monetary damages. *Mauclet v. Nyquist*, and *Rabinovitch c. Nyquist*, Civ. 75-73 (WDNY) and 74-1142 (EDNY) Consolidated (Feb. 11, 1976). In effect, the line for determining "retroactivity" was drawn as of the dates the state was put on notice by filing of the complaints, rather than the later decree date.

The rights discrimination victims seek to enforce are of far greater import than the immunization of state treasuries from all awards. Congress, as is proper, has "arbitrated" the federalism problem involved and then set the national policy and implemented it by those remedies essential to enforce equal employment rights. Federal courts can evaluate, and if need be minimize, any significant degree of immediate fiscal impact upon state treasuries. We ask this Court to keep the Eleventh Amendment in a proper federal perspective harmonious with the paramount national policy involved in legislation enforcing the Fourteenth. Any extension of the entrenched and necessary "fiction" of *Ex parte Young* would be slight, and wholly consistent with the great purpose it has served for years in the protection of constitutional rights in our federal system from diminution by state action.

III. There is no jurisdictional bar to an award of fees against the state, especially where the fees are made costs by Federal statute and are necessary to Court control of litigants' conduct.

The Eleventh Amendment and *Edelman* manifestly concern federal court jurisdiction. *Edelman* held that a suit which seeks the award of an "accrued monetary liability" payable from state revenues is generally beyond federal court jurisdiction. We have just shown that fees do not resemble monetary damages; they are not a "third" cause of action prohibited by *Edelman* (nor is the back pay aspect of the total Title VII relief sought even a second cause of action). Here the federal court had jurisdiction to decide the case, and the fee award is ancillary to or an incident of its decision. In choosing to defend an action properly brought in a federal forum, defendants must assume the usual incidents of the suit, including costs, witness fees, and attorneys' fees. Indeed it follows from *Ex parte Young* that a state will be required to expend funds in the course of litigating cases such as this, including the salaries of its Attorney General and assistants.

Two cases in this Court not involving the Eleventh Amendment acknowledge the incidental nature of fees or costs. In *Bradley v. School Board of the City of Richmond*, 416 U.S. 696, 723 (1974), where there was a fee statute regarding school

desegregation cases, the Court noted that a "district court must have discretion to award fees and costs incident to the final disposition of interim matters". In *Fairmont Creamery Co. v. Minnesota*, 275 U.S. 70, 74 (1927), the Court denied the state's motion to retax costs awarded against it when it lost a criminal appeal, and stated that, "[t] hough a sovereign, in many respects, the State when a party to litigation in this Court loses some of its character as such." According to *Thonen v. Jenkins, supra*, 517 F.2d at 7, fees "are much more analogous to costs of litigation", which are still taxable against states after *Edelman, cf. Boston Chapter N.A.A.C.P., Inc. v. Beecher*, 504 F.2d 1017 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975). They are generically the same as court costs, recoverable as part of the litigation expense by the prevailing party. *Souza v. Travisono*, 512 F.2d 1137, 1140 (1st Cir. 1975), *vacated and remanded* on basis of *Alyeska*, 96 S. Ct. 19.

This easily recognized but sometimes overlooked jurisdictional inability of federal courts to award accrued damages under *Edelman* does not apply to usual costs, or even to fees. This is so, *a fortiori*, where fees are made costs by Congressional enactment. Here, 42 U.S.C. § 2000e-5(k) is plain: the court may award "a reasonable attorney's fee *as part of the costs . . .*" (emphasis added).

Aside from the important reasons Congress had for authorizing fees, its treatment of them as costs indicates at least two basic considerations in TitleVII litigation: first, fees are necessary monetary incidents of court relief, and second, fees are necessary controls upon the behavior of the parties before the court. In civil rights litigation, it is especially appropriate to encourage prompt assessment of legal positions and to discourage delaying tactics, nonmeritorious defenses, and other maneuvers which may at some uncertain point become tantamount to "bad faith". Such awards are consistent with the inherent powers of the courts to promote their own effective functioning and the orderly administration of justice. Thus comments about state delay in the prior section of this brief bear mention and perhaps have greater relevancy here. Note 88 Harv. at 1890-93, esp. 1892.

State officials, however, decry even small amounts from state treasuries and are so blinded by alleged fiscal concerns that they

completely disregard state conduct no matter how deplorable — and national policy and human rights no matter how fundamental. Their fiscal worries truly equate with "legal irresponsibility" and demean not only individual dignity but also modern balanced federalism. Unless official wrongdoing is to be sanctioned, states must be subordinate to national legislation of paramount importance and moral force, and they and their officials should be always subordinate to the fundamental rights of the individual persons they are supposed to serve.

Entirely forgotten in the petitioners' overriding concern with the preservation of the treasury of the State of Connecticut is the fundamental premise underlying both sovereign immunity and its jurisdictional concommitant, the Eleventh Amendment- that the sovereign could and would do justice in any case brought to its attention. Brief in 251, pp. 47-52. Supporters of sovereign immunity argued,

> "It is false in theory to suppose that when an individual has a just claim against the Government it is necessary for him to sue the Government in a court of law to recover it."
>
> Remarks of Congressman Diven, brief in 251, p. 48.

But as this case demonstrates, the theory did not prove false. The briefs of the petitioners and of various *amici* states in support are as remarkable for what they fail to say as for what they do say. Nowhere do petitioners assert that the State of Connecticut can or would voluntarily restore to the respondents the benefits unlawfully denied them. Nowhere in the various *amici* briefs is there any suggestion that any of the interested states could or would voluntarily act other than as Connecticut has done. In order to obtain the justice to which they were entitled, the respondents were required to initiate this litigation and incur expenses. Now the officials of Connecticut and the *amici* states presume to claim the benefits of sovereignty, without accepting its responsibility to do right. Their sole and overriding concern is with the "preservation" of the treasury, and in this respect they are indistinguishable from employers in the private sector. Their misconduct should carry like consequences, including attorneys' fees, as Congress intended.

CONCLUSION

For the foregoing reasons, the judgment of the Second Circuit Court of Appeals as to attorneys' fees should be affirmed.

Respectfully submitted,

PAUL W. ORTH
AUSTIN CAREY, JR. of
HOPPIN, CAREY & POWELL
266 Pearl Street
Hartford, Connecticut 06103

EDWARD GALLANT
Counsel for Respondents in
No. 75-283

March 5, 1976

Supreme Court, U. S.
FILED
FEB 12 1976
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

October Term, 1974
No. 75-283

FREDERICK BITZER, Chairman of the State Employees' Retirement Commission, ROBERT I. BERDON, Treasurer of the State of Connecticut, and NATHAN G. AGOSTINELLI, Comptroller of the State of Connecticut,

Petitioners

v.

DONALD MATTHEWS, MORTIMER COVERT,

Respondents

On Certiorari to the United States Court of Appeals for the Second Circuit.

BRIEF OF THE COMMONWEALTHS OF PENNSYLVANIA AND VIRGINIA AND THE STATES OF FLORIDA, GEORGIA, HAWAII, INDIANA, IOWA, MARYLAND, MISSOURI, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NORTH CAROLINA, NORTH DAKOTA, OHIO, SOUTH CAROLINA, TENNESSEE, TEXAS AND WEST VIRGINIA, AMICI CURIAE

ROBERT P. KANE
Attorney General
LAWRENCE SILVER
Deputy Attorney General,
Chief, Civil Litigation
MELVIN R. SHUSTER
Deputy Attorney General
Dept. of Justice
Capitol Annex
Harrisburg, Pa. 17120

(Continued Inside Cover)

Murrelle Printing Co., Law Printers, Box 100, Sayre, Pa. 18840

ROBERT L. SHEVIN
Attorney General of Florida
State Capitol
Tallahassee, Florida 32304

ARTHUR K. BOLTON
Attorney General of Georgia
132 State Judicial Bldg.
Atlanta, Georgia 30334

RONALD AMEMIYA
Attorney General of Hawaii
State Capitol
Honolulu, Hawaii 96813

THEODORE L. SENDAK
Attorney General of Indiana
219 State House
Indianapolis, Indiana 46204

RICHARD C. TURNER
Attorney General of Iowa
1223 E. Court Room 201
Executive Hills, East
Des Moines, Iowa 50319

FRANCIS B. BURCH
Attorney General of
Maryland
One South Calvert Street
14th Floor
Baltimore, Maryland 21202

JOHN C. DANFORTH
Attorney General of
Missouri
Supreme Court Building
Jefferson City, Mo. 65101

PAUL L. DOUGLAS
Attorney General of
Nebraska
State Capitol
Lincoln, Nebraska 68509

ROBERT LIST
Attorney General of Nevada
Supreme Court Bldg.,
Capitol Annex
Carson City, Nevada 89701

DAVID H. SOUTER
Attorney General of New
Hampshire
State House Annex
Concord, New Hampshire
03301

Of Counsel:
C. RAYMOND MARVIN
1150 17th Street N.W.
Suite 602
Washington, D.C. 20036

WILLIAM F. HYLAND
Attorney General of New
Jersey
State House Annex
Trenton, New Jersey 08625

RUFUS L. EDMISTEN
Attorney General of North
Carolina
Justice Bldg.
P. O. Box 629
Raleigh, North Carolina
27602

ALLEN I. OLSON
Attorney General of North
Dakota
State Capitol
Bismark, North Dakota
58501

WILLIAM J. BROWN
Attorney General of Ohio
State Office Tower
30 East Broad Street
Columbus, Ohio 43215

DANIEL R. McLEOD
Attorney General of South
Carolina
Hampton Office Bldg.
Columbia, South Carolina
29211

R. A. ASHLEY, JR.
Attorney General of
Tennessee
Supreme Court Building
Nashville, Tennessee 37219

JOHN L. HILL
Attorney General of Texas
Supreme Court Bldg.
Austin, Texas 78711

ANDREW P. MILLER
Attorney General of
Virginia
Supreme Court Library
Bldg.
Richmond, Va. 23219

CHAUNCEY H. BROWNING,
JR.
Attorney General of West
Virginia
State Capitol
Charleston, West Virginia
25305

**Attorneys for Amici
Curia**

TABLE OF CONTENTS

	PAGE
Interest of Amici	1
Summary of Argument	3
Argument:	
The Eleventh Amendment Bars the Recovery of Attorneys' Fees From the State	5
A. The doctrine of Edelman v. Jordan precludes the award of attorneys' fees against the state	5
B. The court has consistently refused to permit recovery of monies from state treasuries	10
C. Congress has not abrogated the state's immunity under Title VII	14
D. The State of Connecticut has not waived its immunity from suit under the Eleventh Amendment	18
E. Recovery of attorneys' fees from the state may not be predicated upon the common fund or bad faith exceptions to the American rule	20
F. The award of attorneys' fees against the state is not analogous to the award of costs	24
Conclusion	25

TABLE OF CITATIONS

CASES:

Alyeska Pipe line Service Co. v. Wilderness Society, 421 U.S. 258, 95 S. Ct. 1612 (1975)	7, 20, 22, 24
Chisholm v. Georgia, 2 Dall. 419 (1793)	10

Class v. Norton, 505 F. 2d 123 (2nd Cir. 1974) .. 8

Davis v. Gray, 16 Wall 203 (1872) 12

Doe v. Poelker, 515 F. 2d 541 (8th Cir. 1975) .. 23

Edelman v. Jordan, 415 U.S. 651, 94 S. Ct. 1347 (1974) 3, 4, 5, 6, 7, 8, 9, 13, 14, 15, 19, 20, 21, 22, 24, 25

Employees v. Department of Public Health & Welfare, 411 U.S. 279, 93 S. Ct. 1614 (1973) ..15, 16, 17, 19

Ex parte Young, 209 U.S. 123, 28 S. Ct. 441 (1908) 11, 12, 13

Fairmont Creamery Co. v. Minnesota, 275 U.S. 70, 48 S. Ct. 97 (1927) 4, 25

Fay v. Noia, 372 U.S. 391 (1963) 19

F. D. Rich Co. Inc. v. Industrial Lumber Co., Inc., 417 U.S. 116, 94 S. Ct. 2157 23

Fitzpatrick v. Bitzer, 390 F. Supp. 278 (D. Conn. 1974) 9

Fitzpatrick v. Bitzer, 519 F. 2d 559 (2nd Cir. 1975) 9

Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 87 S. Ct. 1404 (1967) 23

Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 65 S. Ct. 347 (1945) 6

Goldberg v. Kelly, 397 U.S. 254, 90 S. Ct. 1011 (1970) 8

Graham v. Richardson, 403 U.S. 365, 91 S. Ct. 1848 (1971) 8

Great Northern Life Ins. Co. v. Read, 322 U.S. 47, 64 S. Ct. 873 (1944) 13

Hagood v. Southern, 117 U.S. 52, 6 S. Ct. 608 (1886) 13, 24

Hans v. Louisiana, 134 U.S. 1, 10 S. Ct. 504 (1890) 14

In re Ayers, 123 U.S. 443, 8 S. Ct. 164 (1887) ..13, 24

Johnson v. Zerbst, 304 U.S. 458 (1938) 19

Jordan v. Fusari, 496 F. 2d 646 (2nd Cir. 1974) 8

Jordan v. Gilligan, 500 F. 2d 701, cert. den. —— U.S. ——, 44 L. Ed. 481 (1975) 7, 9

Kennecott Copper Corp. v. State Tax Comm., 327 U.S. 573, 66 S. Ct. 745 (1946) 13

Mills v. Electric Auto-Lite Co., 396 U.S. 375, 90 S. Ct. 616 (1970) 21

Named Individual Members v. Texas Highway Department, 496 F. 2d 1017 (5th Cir. 1974) .. 8

Newman v. Piggie Park Enterprises, 390 U.S. 400, 88 S. Ct. 964 (1968) 21

Osborn v. United States Bank, 22 U.S. 738 (1824) 10, 11, 12

Parden v. Terminal Ry. of Ala. St. Docks Dept., 377 U.S. 184, 84 S. Ct. 1207 (1964) 3, 15, 19

Perez v. Ledesma, 401 U.S. 82, 91 S. Ct. 674 (1971) 11

Petty v. Tennessee-Missouri Bridge Commission, 359 U.S. 275, 79 S. Ct. 785 (1959) 10

Poindexter v. Greenhow, 114 U.S. 270, 5 S. Ct. 903 (1855) 12

Sims v. Amos, 409 U.S. 942, 93 S. Ct. 290 (1972), affirming 336 F. Supp. 924 (M.D. Ala. 1972) (3-Judge Court) 7

Skehan v. Board of Trustees of Bloomsburg State College, 501 F. 2d 31 (3rd Cir. 1974), vacated and remanded, —— U.S. ——, 44 L. Ed. 2d 474 (1975) 6, 7

Souza v. Travisono, 512 F. 2d 1137 (1st Cir. 1975) 8, 24

Sprague v. Ticonic National Bank, 307 U.S. 161, 59 S. Ct. 777 (1939) 21

Taylor v. Perini, 503 F. 2d 899 (6th Cir. 1974), vacated on other grounds, —— U.S. ——, 44 L. Ed. 2d 474 (1975) 8

Thonen v. Jenkins, 517 F. 2d 3 (4th Cir. 1975) .. 23

Trustees v. Greenough, 105 U.S. 527 (1881) 21

Vaughn v. Atkinson, 369 U.S. 527, 82 S. Ct. 997 (1962) 23

Wood v. Strickland, 95 S. Ct. 992 (1975) 7

Woolfolk v. Brown, 358 F. Supp. 524 (E.D. Va. 1973) 23

MISCELLANEOUS:

Fair Labor Standards Act, Section 516(b) 15

Federal Employees' Liability Act, 45 U.S.C. Section 51 et seq. 15

Hamilton, The Federalist, No. 81 10

42 U.S.C. Section 1983 .....1, 7, 21

42 U.S.C. Section 2000e-5(k) ..4, 14, 17, 18, 19, 20, 21

86 Stat. 103 17

Pennsylvania Constitution, Article III, Section 24 2

Public Law 89-601, Sec. 102(b) 17

Public Law 92-261 17

Supreme Court Rules, Rule 57 24

Title VII of the Civil Rights Act of 1964 ..1, 3, 14, 16, 17, 18, 19, 20

United States Constitution, Eleventh Amendment 1, 3, 4, 5, 6, 10, 11, 12, 14, 20, 21, 24, 25

INTEREST OF AMICI

The Commonwealth of Pennsylvania, joined by the Commonwealth of Virginia and the States of Florida, Georgia, Hawaii, Indiana, Iowa, Maryland, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, North Carolina, North Dakota, Ohio, South Carolina, Tennessee, Texas and West Virginia, submits this brief *amici curiae* to register its support of the proposition advanced by the State of Connecticut that attorneys' fees may not be awarded against a state given the prohibitions of the Eleventh Amendment. The Commonwealth, as the employer of over one hundred thousand persons, has a clear interest in the interpretation of the provisions of Title VII of the Civil Rights Act of 1964. Additionally, the Commonwealth must defend numerous civil rights actions brought under 42 U.S.C. §1983. In the context of suits under these statutes, the issue of the award of attorneys' fees is a constantly recurring one.

By its very nature, an award of attorneys' fees cannot be predicted by the Commonwealth as an inevitable consequence of civil rights litigation. Aside from the issue of liability on the merits, the decision whether to award attorneys' fees lies in the sound discretion of the Court. The Commonwealth, as is true of all states, must manage its fiscal affairs based upon its perception of expenditures necessary to operate the government in any fiscal year, and then abide by budgetary allocations.

Moreover, the payment to private counsel of attorneys' fees by the state, using public monies, is not a proper

expenditure of such monies absent statutory authority. No general or specific appropriation exists from which such monies might be paid, nor is one likely to be enacted. For a court to compel the payment by Pennsylvania defendants of attorneys' fees would force them to violate Article III, §24 of the Pennsylvania Constitution, which provides that "no money shall be paid out of the treasury, except on appropriation made by law and on warrant issued by the proper officers." The determination of how its revenues are to be spent is peculiarly and uniquely the right of the members of the General Assembly of the Commonwealth. Awards of attorneys' fees in litigation against the Commonwealth would constitute a constitutionally impermissible interference with this sovereign prerogative.

Accordingly, the Commonwealth of Pennsylvania, joined by the aforementioned states, urges the reversal of the decision of the Court of Appeals below asserting the jurisdiction of the federal courts to award attorneys' fees, which must be paid out of state treasuries, to successful litigants against the state.

SUMMARY OF ARGUMENT

The award of attorneys' fees by a federal court against a state absent its consent to suit is inconsistent with the provisions of the Eleventh Amendment to the United States Constitution. This Court has consistently held that the federal courts lack jurisdiction to award money damages against a state, since such awards would be paid from the state treasury and would constitute an unconstitutional interference in the operation of its fiscal affairs, an activity closely bound up with a state's sovereignty. This principle was most recently affirmed by this Court in *Edelman v. Jordan*, 415 U.S. 651, 94 S. Ct. 1347 (1974).

Courts below have cited *Edelman* both to deny and to support the award of attorneys' fees against the state. Those courts viewing *Edelman* as allowing such fees rely on the language in the Court's opinion permitting ancillary effects on the state treasury. It is clear, however, that the Court approved only those fiscal consequences necessarily arising out of a state's compliance with the prospective terms of judicial orders. Payment of attorneys' fees does not fall within that category.

A state may consent to suit and waive its immunity under the Eleventh Amendment. However, in this case, the Congress did not intend to subject the states to suit under Title VII of the Civil Rights Act, nor did the State of Connecticut consent to such suit. Since both of the tests set forth in *Parden v. Terminal Ry. of Ala. St. Docks Dept.*, 377 U.S. 184, 84 S. Ct. 1207 (1964), are not met here, no waiver of immunity may be ascribed to Connecti-

cut. As a result, the discretionary award of attorneys' fees cannot be made under 42 U.S.C. §2000e-5 (k).

Nor may respondents avail themselves of either of the common-law exceptions to the traditional American rule that the prevailing party may not recover attorneys' fees as costs or otherwise. Since money damages may not be recovered from the state, no common fund exists from which the fees may be taken. Drawing from future benefits produced through implementation of injunctive relief fails to satisfy this theory's requirements of an identifiable class and the ability to shift fees with exactitude. The "bad faith" exception also is inapplicable, being punitive in nature, and not necessary to insure compliance with federal law prospectively.

Finally, this Court's decision in *Fairmont Creamery Co. v. Minnesota,* 275 U.S. 70, 48 S. Ct. 97 (1927), awarding costs against a state, is not controlling on the question of attorneys' fees. Indeed, this Court's recent decision in *Edelman v. Jordan,* supra, compels the conclusion that the recovery of costs from the state, like the award of attorneys' fees, also contravenes the provisions of the Eleventh Amendment.

ARGUMENT

THE ELEVENTH AMENDMENT BARS THE RECOVERY OF ATTORNEYS' FEES FROM THE STATE

A. The Doctrine of Edelman v. Jordan Precludes the Award of Attorneys' Fees Against the State

In its recent decision in *Edelman v. Jordan*, 415 U.S. 651, 665, 94 S. Ct. 1347, 1356 (1974), this Court held that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment.[1] The Court rejected the concept of "equitable restitution" as a basis for granting a retroactive award of monetary relief, recognizing that such recovery would undoubtedly be paid from state funds and would therefore be tantamount to an award of damages against the state.[2] It is submitted that

[1] The Eleventh Amendment provides:

"The judicial powers of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of another State, or by Citizens or Subjects of any Foreign State."

[2] In *Edelman*, recipients of benefits from federal-state programs of Aid to Aged, Blind & Disabled (AABD) brought a class action for declaratory and injunctive relief to bring about the timely processing of benefits and to recover retroactively payments wrongfully withheld. The Court affirmed the lower court's award

this same reasoning applies equally to an award of attorneys' fees in actions brought against state officials acting in their official capacities.

The rule recognized by the Court's decision in *Edelman* is that when private parties seek to impose a liability which must be paid from public funds in the state treasury, the Eleventh Amendment is a bar to such suit. Citing *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 65 S. Ct. 347 (1945), the Court concluded that, absent waiver by the state, the actual source of the funds to be recovered is determinative of the invocation of this defense:

> "[W]hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants. Id. at 464, 65 S. Ct. at 350." 415 U.S. at 663, 94 S. Ct. at 1356.

Courts in several circuits have relied upon the foregoing rationale in *Edelman* in denying an award of attorneys' fees in actions brought against state officials.

In *Skehan v. Board of Trustees of Bloomsburg State College*, 501 F. 2d 31 (3rd Cir. 1974), vacated and remanded, U.S. , 44 L. Ed. 2d 474 (1975), the Third Circuit Court of Appeals held that "Edelman, while not ruling on the matter specifically, appears to bar the award of attorneys' fees from the state treasury as well." 501 F. 2d at 43. In a lengthy footnote, the Court rejected the possible argument that this Court's failure to overrule

---

of prospective injunctive relief, but reversed the affirmance by the Court of Appeals of the District Court's order requiring the payment of retroactive benefits.

its summary affirmance in *Sims v. Amos*, 409 U.S. 942, 93 S. Ct. 290 (1972), affirming 336 F. Supp. 924 (M.D. Ala. 1972) (3-Judge Court), indicated its intention to leave the question open.[3] Rather, the omission was viewed as one of inadvertence, with the court concluding: "We think Edelman must be read as closing the door on any money award from a state treasury in any category." 501 F. 2d at 43.[4]

The Court of Appeals for the Sixth Circuit, in *Jordan v. Gilligan*, 500 F. 2d 701, cert den. U.S. , 44 L. Ed. 481 (1975), also adheres to this view. In vacating an award of attorneys' fees to plaintiffs successful in challenging a reapportionment plan for the Ohio Legislature under 42 U.S.C. §1983, the court stated:

> "This cause, insofar as the award of attorneys' fees is concerned, although nominally against the Chief Executive and other officials of the State of Ohio, in substance and effect was against the State. Any award of attorneys' fees, whether against the state of Ohio or its officials, vitally affects the rights and interests of the state in preserving its revenues." 500 F. 2d at 705.

Following *Skehan*, supra, in its reliance upon *Edelman*, the Sixth Circuit Court concluded that "the Eleventh Amend-

---

[3] In *Sims*, where attorneys' fees were awarded against various state officials, the constitutional question here at issue had been given cursory treatment in a footnote to the opinion. *Sims v. Amos*, supra, 340 F. Supp. at 694, n. 8.

[4] In an order dated May 27, 1975, this Court granted certiorari in *Skehan*, and then vacated the judgment and remanded to the Court of Appeals for further consideration in light of *Alyeska Pipeline Service Co. v. Wilderness Society*, 95 S. Ct. 1612 (1975), and *Wood v. Strickland*, 95 S. Ct. 992 (1975).

ment prohibits the awarding of attorneys' fees against unconsenting sovereign states." 500 F. 2d at 709. Accord, *Taylor v. Perini*, 503 F. 2d 899 (6th Cir. 1974), vacated on other grounds, U.S. , 44 L. Ed. 2d 474 (1975); *Named Individual Members v. Texas Highway Department*, 496 F. 2d 1017 (5th Cir. 1974).

Appellate courts in other circuits have arrived at the opposite conclusion, relying upon different language in *Edelman* to allow the award of attorneys' fees against the state. In *Souza v. Travisono*, 512 F. 2d 1137 (1st Cir. 1975); *Class v. Norton*, 505 F. 2d 123 (2nd Cir. 1974); and *Jordan v. Fusari*, 496 F. 2d 646 (2nd Cir. 1974), these circuit courts upheld the award of attorneys' fees as having a permissible "ancillary effect on the state treasury" resulting from compliance with the award of injunctive relief. While these courts did not deny that such an award must issue from public funds in the state treasury, they viewed it as having a minimal impact upon state finances, as well as being a necessary incident to the award of injunctive relief.

However, the context of this language in the *Edelman* opinion establishes that the focus of the Supreme Court was limited to the expenditure of state funds necessary in complying with whatever injunctive relief was afforded. Referring to prior Supreme Court decisions, the effects of which were to increase future welfare benefits paid from state treasuries,[5] the Court explained:

> "But the fiscal consequences to state treasuries in these cases were the necessary result of compliance with decrees which by their terms were prospective

---

[5] See, *Graham v. Richardson*, 403 U.S. 365, 91 S. Ct. 1848 (1971); *Goldberg v. Kelly*, 397 U.S. 254, 90 S. Ct. 1011 (1970).

> in nature. State officials, in order to shape their official conduct to the mandate of the Court's decrees, would more likely have to spend money from the state treasury than if they had been left free to pursue their previous course of conduct. *Such an ancillary effect on the state treasury is a permissible and often inevitable consequence of the principle announced in Ex Parte Young, supra.*" 415 U.S. at 668, 94 S. Ct. 1358. (Emphasis supplied.)

Unlike the "ancillary effect" occasioned by prospective injunctive relief, the award of attorneys' fees is more analogous to a recovery of damages for breach of a legal duty.

The course of the instant litigation mirrors this difference in interpretation of *Edelman.* In denying an award of attorneys' fees, the District Court followed the view of *Jordan v. Gilligan*, supra, concluding that: "While the amount sought in this case is not prohibitive, once the floodgates are opened, adequate control no longer prevails." *Fitzpatrick v. Bitzer*, 390 F. Supp. 278, 289 (D. Conn. 1974). On appeal, the Court of Appeals adopted the view that:

> "In order to invoke the court's power to enjoin such future illegal conduct, it was necessary to incur costs and attorneys' fees which, as we recently held in Class v. Norton, 505 F. 2d 123, 126-27 (2nd Cir. 1974), may be assessed as having a permissible 'ancillary effect' on the state treasury, see Edelman v. Jordan, 415 U.S. at 667-68, of a prospective order." *Fitzpatrick v. Bitzer*, 519 F. 2d 559, 571 (2nd Cir. 1975).

The issue thus joined requires this Court to identify the category into which the award of attorneys' fees falls: that

of retroactive monetary damages or that of equitable relief provided by injunction. The resolution of the question may be found in an examination of the reasons for the adoption of the Eleventh Amendment, its subsequent application in cases before this Court, and the purposes and effects of attorneys' fees awards in light of those precedents.

B. The Court Has Consistently Refused To Permit Recovery of Monies From State Treasuries

---

Adopted by the states subsequent to this Court's decision in *Chisholm v. Georgia*, 2 Dall. 419 (1793),[6] the Eleventh Amendment served to calm the widespread fears that the federal courts would be used by former British Loyalists to press for payment of debts and other claims against the states incurred during the Revolutionary War. Such suits were viewed as a threat to the fiscal autonomy, and possibly financial stability, of the states.[7] Moreover, the Amendment restored the concept of state sovereignty in the federal system to the position it had occupied prior to the ratification of the Constitution.[8]

Nevertheless, in *Osborn v. United States Bank*, 22 U.S. 738 (1824), the Court narrowly construed the Eleventh Amendment, limiting its application to suits

---

[6] The decision in *Chisholm v. Georgia* upheld the jurisdiction of the federal courts under Article III to hear suits brought by the citizens of one state against another state to recover on debts owed by the state.

[7] See, *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275, 276, n. 1, 79 S. Ct. 785 (1959).

[8] See, *Hamilton, The Federalist*, No. 81.

where the state is a party of record, in order to uphold an injunction against the collection of a state tax imposed upon the Bank of the United States. The language of Chief Justice Marshall's decision, decidedly Federalist in tone, underscored the necessity for the federal courts to exercise jurisdiction over the actions of state officials, despite the Eleventh Amendment, in order to preserve the supremacy of federal law. The alternative presented would be that:

> "Each member of the Union is capable, at its will, of attacking the nation, of arresting its programs at every step, of acting vigorously and effectively in the execution of its designs, while the nation stands naked, stripped of its defensive armor, and incapable of shielding its agent or executing its laws otherwise than by proceedings which are to take place after the mischief is perpetrated and which must often be ineffectual, from the inability of the agents to make compensation." 22 U.S. at 846.

Between the Court's decision in *Osborn* and its ruling in *Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441 (1908), Congress made the federal courts the primary guardians of Constitutional rights, with *Ex parte Young* being "the culmination of this Court's efforts to harmonize the principles of the Eleventh Amendment with the effective supremacy of rights and powers secured elsewhere in the Constitution." *Perez v. Ledesma*, 401 U.S. 82, 106, 91 S. Ct. 674, 687 (1971) (Brennan, J., concurring in part and dissenting in part).

In *Ex parte Young*, supra, several railroads and their shareholders alleged the unconstitutionality under the Fourteenth Amendment of certain railroad rates, and sought and obtained in federal court an injunction against

the Attorney General of Minnesota restraining him from enforcing as against them penalties specified in the state act under challenge. The Attorney General claimed the Eleventh Amendment deprived the federal court of issuing such an order, and went ahead to enforce the criminal sanctions of the state act.

Upholding the lower court's power to restrain the Attorney General's actions and the subsequent action for contempt, this Court held:

> "If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer, in proceeding under such enactment, comes into conflict with the superior authority of that Constitution, and be in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The state has no power to impart to him any immunity from responsibility to *the supreme authority of the United States.*" 209 U.S. at 159-60, 28 S. Ct. at 454. (Emphasis supplied.)

In order to vindicate Constitutional law and overcome the Eleventh Amendment proscription against suits brought against the state, it was necessary for the Court to remove the mantle of sovereign immunity from the actions of state officials by creating the fiction that such actions represented breaches performed in an individual, not official, capacity. Such a theory had precedential support extending from *Osborn v. United States Bank*, supra; *Davis v. Gray*, 16 Wall 203 (1872); and *Poindexter v. Greenhow*, 114 U.S. 270, 5 S. Ct. 903 (1855).

However, the Court also took cognizance in *Young* of those cases in which actions nominally brought against

state officials to enforce the performance of contracts with the state actually constituted suits against the state itself, because if relief were allowed the state treasury itself would be directly affected. *Hagood v. Southern*, 117 U.S. 52, 6 S. Ct. 608 (1886); *In re Ayers*, 123 U.S. 443, 8 S. Ct. 164 (1887). This Court in *Edelman* specifically alluded to *Hagood* and *Ayers* to "demonstrate that equitable relief may be barred by the Eleventh Amendment". 415 U.S. at 667, 94 S. Ct. at 1347. Accordingly, the scope of the Court's decision in *Ex parte Young* cannot be construed to have sanctioned federal jurisdiction to hear suits the object of which would be to effect recovery of funds from the state treasury. Rather, the thrust of *Ex parte Young* was to insure the compliance of state officials with the supremacy of federal law, not to require the expenditure of state funds and thereby encroach upon a fundamental attribute of state sovereignty—its fiscal integrity.

Cases subsequent to *Ex parte Young* demonstrate the continued application of this principle. In *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 53-54, 64 S. Ct. 873, 876 (1944), the Court observed:

> "The principle of immunity from litigation assures the states and the nation from anticipated intervention in the processes of government, while its rigors are mitigated by a sense of justice which has continually expanded by consent of the suability of the sovereign. The history of sovereign immunity and the practical necessity of unfettered freedom for government from crippling interferences require a restriction of suability to the terms of the consent, as to persons, courts and procedures."

Accord, *Kennecott Copper Corp. v. State Tax Comm.*, 327 U.S. 573, 66 S. Ct. 745 (1946). The focus in these cases

was directed to the absence of any consent to suit in a federal forum for the recovery of taxes, and the concurrent exclusivity of a state forum provided for that purpose. However, implicit in these decisions was the immunity of the state from suit in even its own courts absent its consent, *Hans v. Louisiana*, 134 U.S. 1, 10 S. Ct. 504 (1890), particularly in matters regarding state finances.

C. Congress Has Not Abrogated the State's Immunity Under Title VII

It is not disputed that attorneys' fees in this case would be paid from funds in the state treasury. Respondents in the Court below, predicated their claim to such an award upon the statutory authority of Title VII of the Civil Rights Act, 42 U.S.C. §2000e-5(k), and upon the power of the Court to award attorneys' fees as an incident to the prospective relief granted. The Court of Appeals concurred, allowing that the award would have only an ancillary effect on the state treasury permitted by *Edelman v. Jordan*, supra.

Respondents' reliance upon §2000e-5(k) is misplaced. Given the Eleventh Amendment bar to suits against the state, unless the State of Connecticut waived its immunity from suit under Title VII, the above section providing for the discretionary award of attorneys' fees is of no effect. Although respondents suggest that additionally a waiver of a state's Eleventh Amendment immunity can be effected by Congress, that suggestion ignores the constitutional limitations on Congress in a case such as

this. The question of whether Congress has sought to abrogate the state's Eleventh Amendment immunity in order to regulate proprietary activities not bound up with its sovereign functions is not the issue here as it was in *Parden v. Terminal Ry. of Ala. St. Docks Dept.,* 377 U.S. 184, 84 S. Ct. 1207 (1964). The State of Connecticut and all other states, in performing the basic governmental functions of hiring employees and providing benefits for their retirement, engages in activities intimately bound up with the exercise of its sovereign powers. Congress cannot erode the state's Eleventh Amendment immunity by requiring it to submit to federal jurisdiction under Title VII or, in effect, cease to function by virtue of not employing any governmental personnel.

Although, in *Parden v. Terminal Ry. of Ala. St. Docks Dept., supra,* the court found that Congress, in passing the Federal Employees' Liability Act, 45 U.S.C. §51, *et seq.,* intended to abrogate the immunity of the states, that case involved the regulation of proprietary activities, *i.e.,* the operation by the State of Alabama of a railroad operating in interstate commerce which therefore made it a common carrier within the terms of FELA. Furthermore, the court's decision did not rely entirely upon a finding of Congressional abrogation. It also found that the state operated the railroad after the passage of the federal statutes and thereby consented to suit in federal courts under FELA. *Employees v. Department of Public Health & Welfare,* 411 U.S. 279, 93 S. Ct. 1614 (1973).

Moreover, in *Employees,* the Court refused to extend its finding in *Parden* of Congressional abrogation of immunity "to cover every exercise by Congress of its commerce power" and noted that "the concept of implied con-

sent or waiver relied upon in Parden approaches, on the facts of that case, the outer limit of the sort of voluntary choice which [the Supreme Court] generally associate[s] with the concept of constitutional waiver." *Employees*, supra, at 296, 93 S. Ct. at 1624 (Marshall, J., concurring) (citations omitted).

Involved in *Employees* was the application of 516 (b) of the Fair Labor Standards Act, which subjects employers to damage actions for violations of the Act. Notwithstanding that state-owned hospitals and schools were an "employer" under the term of the Act, the Court rejected the argument that Congress intended to abrogate the state's immunity from suit:

> "It is not easy to infer that Congress in legislating pursuant to the Commerce Clause, which has grown to vast proportions in its applications, desired silently to deprive the States of an immunity they have long enjoyed under another part of the Constitution. Thus, we cannot conclude that Congress conditioned the operation of these facilities on the forfeiture of immunity from suit in a federal forum.
>
> * * * * * * *
>
> "It is true that, as the Court said in Parden, 'the States surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce.' 377 U.S., at 191. But we decline to extend Parden to cover every exercise by Congress of its commerce power, when the purpose of Congress to give force to the Supremacy Clause by lifting the sovereignty of the States and putting the States on the same footing as other employers is not clear." *Employees*, supra, at 285, 286, 93 S. Ct. at 1618, 1619.

Thus, even if Congress could constitutionally abrogate a state's Eleventh Amendment immunity, the intent of Congress to abrogate a state's immunity by amending Title VII is not present in this case as it was not present in *Employees*. This is best demonstrated by an analysis of the 1972 amendments to Title VII. Prior to the 1972 amendments, §2000e-5(e) provided, in pertinent part:

> "If within thirty days after a charge is filed with the Commissioner or within thirty days after expiration of any period of reference under subsection (c) of this section . . . the Commission has been unable to obtain voluntary compliance with this subchapter, the Commission shall notify the person aggrieved and a civil action may . . . be brought against the respondent named in the charge (1) by the person claiming to be aggrieved, or (2) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice."

By enacting Public Law 92-261,[9] Congress amended Title VII to include "government", "governmental agencies" and "political subdivisions" as employers under the Act, 42 U.S.C. §2000e, in much the same way as Congress amended the FLSA to include government hospitals, institutions, schools, etc., as employers under that Act. See §102(b) of Public Law 89-601. Public Law 92-261 also amended and redesignated §2000e-5(e) and its provisions now appear as §2000e-5(f)(1). The 1972 amendments to Title VII, as contained in §2000e-5(f)(1), specifically provide for suits by the Attorney General of the United

---

[9] 86 Stat. 103.

States against governmental entities in the appropriate district court:

> "In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States District Court. . . ."

The amendments do not make a similar provision for suits by a private party against a state. Indeed, both prior and subsequent to the 1972 amendments, Title VII provided for private civil actions solely against "the respondent named in the charge".

The 1972 amendments to Title VII no more lifted the immunity of the states than did the 1966 amendments to the FLSA. Indeed, here Congress' intent to abrogate the state's immunity is totally lacking. Accordingly, assuming arguendo that Congress can constitutionally abrogate a state's Eleventh Amendment immunity, the absence of such Congressional intent defeats the application of §2000e-5(k) as a source of attorneys' fees in this action.

D. The State of Connecticut Has Not Waived Its Immunity From Suit Under the Eleventh Amendment

---

The same reasoning employed by the Court of Appeals below to reject any inference of voluntary waiver or con-

sent with regard to private damage suits under Title VII, 42 U.S.C. §2000e-5 (q), is equally applicable to an award of attorneys' fees under §2000e-5 (k). Connecticut's performance of the governmental function of hiring employees to perform state duties and providing for their retirement clearly antedated the 1972 amendment to §2000e bringing the states within the scope of the Title VII, and the continuation of those functions can in no way be construed as a voluntary waiver of sovereign immunity with respect to *any* of the act's provisions. Cf. *Fay v. Noia*, 372 U.S. 391 (1963); *Johnson v. Zerbst*, 304 U.S. 458 (1938).

Mr. Justice Marshall took a similar view in his concurring opinion in *Employees*, supra, in which he rejected any waiver of immunity by the state with respect to the application of the FLSA to employees of various facilities operated by the Missouri Department of Public Health & Welfare:

> "Here the State was fully engaged in the operation of the affected hospitals and schools at the time of the 1966 amendments. To suggest that the State had the choice of either ceasing operations of these vital public services or 'consenting' to federal suit suffices, I believe, to demonstrate that the State had no true choice at all and thereby that the State did not voluntarily consent to the exercise of federal jurisdiction in this case." 411 U.S. at 296, 93 S. Ct. 1624.

The state's posture in *Employees* was deemed unlike the factual circumstances in *Parden*, supra, in which the Federal Employees' Liability Act was held applicable to the State of Alabama. As in *Employees*, and in contrast to *Parden*, the State of Connecticut engaged in employment practices governed by Title VII before the statute was made

applicable to governmental bodies in 1972, and therefore could not be viewed as having consented to suit under the Civil Rights Act's provisions. As the Court said in *Edelman v. Jordan*, supra:

> "Constructive consent is not a doctrine commonly associated with the surrender of constitutional rights . . . In deciding whether a State has waived its constitutional protection under the Eleventh Amendment, we will find waiver only where stated 'by the most express language or by such overwhelming implication from the text as [will] have no room for any other reasonable construction.' Murray v. Wilson Distilling Co., 213 U.S. 151, 171, 29 S. Ct. 458, 464 (1909)." 415 U.S. at 673, 94 S. Ct. at 1361.

Since the State of Connecticut gave no express waiver of its immunity from suit with respect to Title VII, it cannot be subject to any of the statute's provisions, including §2000e-5(k).

E. Recovery of Attorneys' Fees From the State May Not Be Predicated Upon the Common Fund or Bad Faith Exceptions to the American Rule

---

Since the Eleventh Amendment remains a bar to the application of §2000e-5(k) and its authorization of an award of attorneys' fees, respondents might seek to rely upon some commonlaw base for such an award. In *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 258, 95 S. Ct. 1612 (1975), this Court made clear that, in the absence of an applicable statutory provision allowing

attorneys' fees, an award under a "private attorney general" theory is precluded, notwithstanding that it has been brought under 42 U.S.C. §1983 for the purpose of vindicating constitutional rights. But cf., *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 88 S. Ct. 964 (1968). Although the Court of Appeals' view that the incurring of attorneys' fees was necessary in this case to bring the state officials' conduct into conformity with federal law suggests the application of the private attorney general theory, in the absence of Connecticut's consent to pay attorneys' fees under §2000e-5(k), attorneys' fees may not be based upon this theory.

Neither of the two recognized exceptions to the American rule against awarding attorneys' fees presents a basis for awarding such fees in litigation against the state, given the purposes of the Eleventh Amendment. Under the "common fund" doctrine, a trustee of a fund or property, or a party preserving or recovering a fund for the benefit of others in addition to himself, has been permitted to recover attorneys' fees from the fund or property itself, or from the other parties receiving the benefit. *Trustees v. Greenough*, 105 U.S. 527 (1881); *Sprague v. Ticonic National Bank*, 307 U.S. 161, 59 S. Ct. 777 (1939); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 90 S. Ct. 616 (1970). However, since *Edelman* precludes the award of retroactive monetary relief against the state, no fund would be available from which to reimburse litigants such as respondents.

In addition, the underlying theory of this exception in spreading the cost of the litigation so as to avoid unjust enrichment of the beneficiaries of the suit does not coincide with the justification for the imposition of prospective injunctive relief, namely to insure the supremacy of

federal law. Rather, the theory looks back to the recovery of funds awarded because of prior breaches of a constitutional or legal duty, and permits the compensation of the plaintiff for incurring the expenses of bringing the suit and amassing such a fund. Since the Court in *Edelman* has already determined that the award of retroactive benefits is not so essential to the effectuation of federal law that it overcomes the Eleventh Amendment bar to suits against the state, that reasoning applies *a fortiori* to an award of attorneys' fees which would be based upon such an award.

To predicate an award of attorneys' fees upon additional retirement benefits flowing prospectively from the operation of the injunction in this case would also be inconsistent with the application of the "common fund" theory. As the Court pointed out in *Alyeska*, supra,

> "In this Court's common fund and common benefit decisions, the class of beneficiaries was small in number and easily identifiable. The benefits could be traced with some accuracy, and there was reason for confidence that the costs could indeed be shifted with some exactitude to those benefiting." 421 U.S. at 265, 95 S. Ct. at 1625, n. 39.

In the instant action, the beneficiaries of the lower Court's injunction are all males presently in the state retirement system or who will enter into it. There is no way to trace with accuracy the number of males who will benefit in the future from the prospectively uniform retirement policy mandated by the lower Court's order. Similarly, the share of the future retirement funds attributable to such beneficiaries cannot be calculated, given numerous variables including the number of males in the system, their ages at retirement, and length of service. Accordingly, the "com-

mon fund" rationale fails to provide a basis for an award of attorneys' fees in this case.

Similarly, the "bad faith" exception to the American rule is not invoked for the purpose of securing a constitutional or federal right. Under this theory, attorneys' fees may be assessed where a litigant willfully disobeys a court's order, *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717, 87 S. Ct. 1404 (1967), or when the losing party has "acted in bad faith, vexatiously, wantonly, or for oppressive reasons". *F. D. Rich Co. Inc. v. Industrial Lumber Co., Inc.*, 417 U.S. 116, 129, 94 S. Ct. 2157, 2165 (citing *Vaughn v. Atkinson*, 369 U.S. 527, 82 S. Ct. 997 (1962). The award of attorneys' fees in such situations constitutes a punitive measure directed against a losing party who has in some fashion abused the legal process. By its very terms, "bad faith" fees do not inexorably flow from injunctive relief granted by a federal court. Rather, the court may, in its discretion, award attorneys' fees where the issue litigated has already been clearly established, *Doe v. Poelker*, 515 F. 2d 541 (8th Cir. 1975), or where the defendants have exercised dilatory tactics in the course of the litigation. *Thonen v. Jenkins*, 517 F. 2d 3 (4th Cir. 1975). Moreover, even in the instance of contempt of court, the judge may decline to award attorneys' fees. *Woolfolk v. Brown*, 358 F. Supp. 524 (E.D. Va. 1973). The decision of a court to award fees on "bad faith" grounds thus turns on grounds unrelated to insuring a defendant's future conformity with federal law. Rather, if awarded at all, attorneys' fees are allowed for the purpose of punishing the losing party for bad faith actions in the past. Consequently, award of fees on this basis cannot be characterized as a necessary prerequisite to the entry of injunctive relief.

Both of the above theories have been described as "assertions of inherent power in the courts to allow attorneys' fees in particular situations . . ." *Alyeska Pipeline Service Co. v. Wilderness Society*, supra, 95 S. Ct. at 1622. However as pointed out in *Edelman*, supra, relief "equitable" in nature may be barred by the Eleventh Amendment. *Hagood v. Southern*, supra; *In re Ayers*, supra. Therefore, the Eleventh Amendment remains a bar to the award of attorneys' fees under either of the recognized exceptions to the American Rule, regardless of whether they are characterized as forms of relief retroactive or prospective in nature.

F. The Award of Attorneys' Fees Against the State Is Not Analogous to the Award of Costs

---

Finally, this Court's decision to impose costs upon the state litigant in *Fairmont Creamery Co. v. Minnesota*, 275 U.S. 70, 48 S. Ct. 97 (1927), does not provide the precedential authority for awarding attorneys' fees.[10] The Court did not refer to the Eleventh Amendment in *Fairmont Creamery*, possibly because the action had originated as a criminal prosecution by the state. Moreover, costs were found to have been traditionally imposed where judgment was entered against a state, under Supreme Court rule.[11]

---

[10] The First Circuit Court of Appeals, in *Souza v. Travisono*, 512 F. 2d 1137 (1st Cir. 1975), concluded that court costs and attorneys' fees seem generically the same, both being litigation expenses recoverable by the successful party. 512 F. 2d at 1140.

[11] Rule 57 of the Supreme Court Rules presently governs the award of costs.

The continued vitality of *Fairmont Creamery* is open to serious doubt. The decision has not been reviewed by this Court in subsequent cases and its underlying rationale is inconsistent with the Court's recent pronouncements in *Edelman v. Jordan*, supra. Costs taxed against the state, however minimal, nevertheless are paid from the state treasury, as are attorneys' fees awarded against the state. On the strength of *Edelman*, amicus suggests that *Fairmont Creamery* not only does not support respondents' claim to an award of attorneys' fees from the state, but that the taxation of costs against the state may no longer be sustained in the face of the prevailing application of the Eleventh Amendment, and that *Fairmont Creamery* should be explicitly overruled.

CONCLUSION

Throughout its decisions in Eleventh Amendment cases, this Court has sought to harmonize the supremacy of the Constitution and federal law with the fundamental independence of the states within the federal system. The Court has been especially sensitive to the potential encroachment on that independence which could result from assertions of federal power over the financial operations of the states. By limiting the scope of federal court rulings absent state consent to suit to prospective injunctive relief and avoiding direct impact upon the state treasuries, the Court has successfully preserved both values. The award of attorneys' fees against the State of Connecticut by the Court of Appeals runs directly counter to the established precedent in this area of the law.

It is respectfully submitted that the decision of the Court of Appeals remanding the case to the District Court for consideration of the propriety of an award of attorneys' fees be reversed.

Respectfully submitted,

ROBERT P. KANE
Attorney General
of Pennsylvania

LAWRENCE SILVER
Deputy Attorney General
Chief, Civil Litigation

MELVIN R. SHUSTER
Deputy Attorney General

ROBERT L. SHEVIN
Attorney General of Florida

ARTHUR K. BOLTON
Attorney General of Georgia

RONALD AMEMIYA
Attorney General of Hawaii

THEODORE L. SENDAK
Attorney General of Indiana

RICHARD C. TURNER
Attorney General of Iowa

FRANCIS B. BURCH
Attorney General of Maryland

JOHN C. DANFORTH
Attorney General of Missouri

PAUL L. DOUGLAS
Attorney General of Nebraska

ROBERT LIST
Attorney General of Nevada

DAVID H. SOUTER
Attorney General of New Hampshire
WILLIAM F. HYLAND
Attorney General of New Jersey
RUFUS L. EDMISTEN
Attorney General of North Carolina
ALLEN I. OLSON
Attorney General of North Dakota
WILLIAM J. BROWN
Attorney General of Ohio
DANIEL R. MCLEOD
Attorney General of South Carolina
R. A. ASHLEY, JR.
Attorney General of Tennessee
JOHN L. HILL
Attorney General of Texas
ANDREW P. MILLER
Attorney General of Virginia
CHAUNCEY H. BROWNING, JR.
Attorney General of West Virginia

Attorneys for Amici Curiae

Of Counsel:
C. RAYMOND MARVIN

Supreme Court, U. S.
FILED
FEB 14 1976
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-283

FREDERICK BITZER, Chairman of the State Employees' Retirement Commission, ROBERT I. BERDON, Treasurer of the State of Connecticut, and NATHAN G. AGOSTINELLI, Comptroller of the State of Connecticut,

Petitioners,

v.

DONALD MATTHEWS, MORTIMER COVERT,

Respondents.

On Certiorari to The United States Court of Appeals For the Second Circuit

Brief of State of California Amicus Curiae

EVELLE J. YOUNGER,
Attorney General of the State of California

N. EUGENE HILL,
Assistant Attorney General

EDMUND E. WHITE,
Deputy Attorney General

RICHARD M. SKINNER,
Deputy Attorney General
555 Capitol Mall, Suite 550
Sacramento, California 95814
Telephone: (916) 445-2937
Attorneys for the State of California Amicus Curiae on behalf of Petitioners

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

TOPICAL INDEX

Page

The Interest of the State of California as Amicus Curiae 1

Argument 2

I. An Award of Attorneys' Fees Is Not a Necessary Attribute to Compliance with a Decree Proper Under *Ex Parte Young* but Reflects Separate Policy Considerations Which Cannot Override the Eleventh Amendment's Command 2

A. Attorneys' Fee Awards Are a Distinct Judicial Remedy, Reflecting Non-Constitutional Policy Determinations, and Thus Cannot Be Imposed in Conflict with the Eleventh Amendment 4

B. Federal Imposition of Attorneys' Fees Upon the Non-Consenting States Is Unnecessary to Achieve Compliance with an Otherwise Valid Court Order 8

II. There Is No Supreme Court Precedent for the Usurpation of State Sovereignty by the Award of Attorneys' Fees 10

Conclusion 14

LIST OF AUTHORITIES CITED

Pages

Alyeska Pipeline Co. v. Wilderness Society, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975) 6

6 Annals of Congress 809 (1798) 2

Boston Chapter N.A.A.C.P., Inc. v. Beecher, 504 F.2d 1017 (1 CA; 1974), certiorari denied *sub. nom.* Director of Civil Service of Massachusetts v. Boston Chapter, N.A.A.C.P., Inc., 421 U.S. 910, ... S.Ct. ...., ... L.Ed.2d .... (1975) 5, 10, 11

Brandenburger v. Thompson, 494 F.2d 885 (9 CA; 1974) 5

Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 5 L.Ed. 257 (1821) 12, 13

Edelman v. Jordan, 415 U.S. 651, 94 S.Ct 1347, 39 L.Ed.2d 662 (1973) ..... Passim

Employees v. Missouri Public Health Department, 411 U.S. 279, 93 S.Ct. 1614, 36 L.Ed.2d 251 (1973) 2

Ex parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908) ..... Passim

Fairmont Creamery Co. v. State of Minnesota, 275 U.S. 70, 48 S.Ct. 97, 72 L.Ed. 168 (1927) 10, 11, 12, 13

Fitzpatrick v. Bitzer, 519 F.2d 559 (2 CA; 1975) 5, 8, 9

Gates v. Collier, 489 F.2d 298 (5 CA; 1973), petition for rehearing en banc granted, 500 F.2d 1382 (5 CA; 1974) 5, 8

General Oil Co. v. Crain, 209 U.S. 211, 28 S.Ct. 475, 52 L.Ed. 754 (1908) 3

Great Northern Life Insurance Co. v. Read, 322 U.S. 47, 64 S.Ct. 873, 88 L.Ed. 1121 (1944) 4

Pages

Hans v. Louisiana, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890) 13

Jordan v. Fusari, 496 F.2d 646 (2 CA; 1974) 5
Jordon v. Gilligan, 500 F.2d 701 (6 CA; 1974), certiorari denied, 421 U.S. 991, ... S.Ct. ...., 44 L.Ed.2d 481 (1975) 2, 5

Land v. Dollar, 330 U.S. 731, 67 S.Ct. 1009, 91 L.Ed. 1209 (1946) 13
La Raza Unida v. Volpe, 57 F.R.D. 94 (N.D.Ca.; 1972) 5

Murgia v. Commonwealth of Mass. Bd. of Retirement, 386 F.Supp. 179 (D.Mass.; 1974) (three-judge court), aff'd mem. 421 U.S. 972, 95 S.Ct. 1972, 44 L.Ed.2d 464 (1975) 5

Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 88 S.Ct. 964, 19 L.Ed.2d 1263 (1968) 7
Note, A Practical View of the Eleventh Amendment—Lower Court Interpretations and the Supreme Court's Reaction, 61 Georgetown L.J. 1473, 1480-1481 (1973) 13

Sims v. Amos, 340 F.Supp. 691 (M.D.Ala.) (three-judge court), aff'd mem. 409 U.S. 942, 93 S.Ct. 290, 34 L.Ed.2d 215 (1972) 5
Skehan v. Board of Trustees of Bloomsburg State College, 501 F.2d 31 (3 CA; 1974), vacated on other grounds, 421 U.S. 983, 95 S.Ct. 1986, 44 L.Ed.2d 474 (1975) 5

Pages

Souza v. Travisono, 512 F.2d 1137 (1 CA; 1975) 10, 11

Taylor v. Perini, 503 F.2d 899 (6 CA; 1974), vacated on other grounds, 421 U.S. 982, 95 S.Ct. 1985, 44 L.Ed.2d 474 (1975) 5

Thonen v. Jenkins, 517 F.2d 3 (4 CA; 1975) 5

Trustees v. Greenough, 105 U.S. 527, 26 L.Ed. 1157 (1882) 7

U.S. Constitution, Amendment 11 .....Passim

United States v. Mississippi, 380 U.S. 128, 85 S.Ct. 808, 13 L.Ed.2d 717 (1965) 9

United States v. State of Washington, 66 F.R.D. 477 (W.D.Wash.; 1974) 5

42 U.S.C.A. § 2000e-5(f), P.L. 92-261, § 4(a)..... 9

42 U.S.C.A. § 2000e-5(f)(1) 10

42 U.S.C.A. § 2000e-5(k) 7

1972 U.S. Code Cong. and Adm. News 2137, 2147-2148 9

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-283

FREDERICK BITZER, Chairman of the State Employees' Retirement Commission, ROBERT I. BERDON, Treasurer of the State of Connecticut, and NATHAN G. AGOSTINELLI, Comptroller of the State of Connecticut,

Petitioners,

v.

DONALD MATTHEWS, MORTIMER COVERT,

Respondents.

Brief of State of California Amicus Curiae

THE INTEREST OF THE STATE OF CALIFORNIA AS AMICUS CURIAE

Whether a federal court can, consistent with the Eleventh Amendment to the United States Constitution, require a sovereign state to pay an award of attorneys' fees is a question of fundamental significance to the State of California, as it is to every member of this Republic.

In *Jordan v. Gilligan*, 500 F.2d 701, 704-705 (6 CA; 1974), certiorari denied, 421 U.S. 991, ... S.Ct. ....., 44 L.Ed.2d 481 (1975), the Court of Appeal said:

> "Any award of attorneys' fees, whether against the State [. . .] or its officials, vitally affects the rights and interests of the State in preserving its revenues."[1]

California thus appears, not to do battle with the federal policies which support awards of attorneys' fees generally, but to avoid the threatened competition in its own legislative halls between federal claims for the funding of those federal aims and the legitimate funding priorities established by the needs of its own populace.

ARGUMENT

I. An Award of Attorneys' Fees Is Not a Necessary Attribute to Compliance with a Decree Proper Under Ex Parte Young but Reflects Separate Policy Considerations Which Cannot Override the Eleventh Amendment's Command

Since the ratification of the Eleventh Amendment[2] to the United States Constitution on January 8, 1798, 6 *Annals of Congress* 809 (1798), the relevant parameters of its application or non-application can basically be discerned from just two decisions of this Court: *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908); and *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1973).

---

1. *See also Employees v. Missouri Public Health Department*, 411 U.S. 279, 286, 93 S.Ct. 1614, 36 L.Ed.2d 251 (1973), wherein this Court implied that a similar award of attorneys' fees against a state might be too harsh a treatment to be compatible with the "pursuit of a harmonious federalism."

2. "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

In *Ex parte Young*, the Court upheld the power of the federal judiciary to enjoin a state official's enforcement of an unconstitutional state statute. Reasoning that "the use of the name of the State to enforce an unconstitutional act . . . is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity," 209 U.S., *supra*, at 159, 28 S.Ct., at 454, 52 L.Ed., at 729, the Court found the Eleventh Amendment not to be a bar to the federal court's prospective action against the state officer.

While the Court employed a patent fiction to reach its conclusion in *Ex parte Young*, that conclusion was vital to the preservation of the federal-state relationship as conceived in the Constitution. As Justice McKenna wrote in *General Oil Co. v. Crain*, 209 U.S. 211, 28 S.Ct. 475, 52 L.Ed. 754 (1908), decided the same day as *Ex parte Young*, *supra*,

> "If a suit against state officers is precluded in the national courts by the Eleventh Amendment to the Constitution, and may be forbidden by a State to its courts, as it is contended in the case at bar that it may be, without power of review by this court, it must be evident that an easy way is open to prevent the enforcement of many provisions of the Constitution, and the Fourteenth Amendment, which is directed at state action, could be nullified as to much of its operation." *General Oil Co. v. Crain*, 209 U.S., *supra*, at 226, 28 S.Ct., at 480, 52 L.Ed., at 763-764.

Edelman v. Jordan, *supra*, on the other hand, faced the question whether the Eleventh Amendment permitted a federal court to impose upon a state a retroactive award of monetary relief.

Holding such an award to be beyond the court's jurisdiction, this Court distinguished its nature from those fiscal consequences to the states which are

> "the necessary result of compliance with decrees which by their terms were prospective in nature. State officials, in order to shape their official conduct to the mandate of the Court's decrees, would more likely have to spend money from the state treasury than if they had been left free to pursue their previous course of conduct. Such an ancillary effect on the state treasury is a permissible and often an inevitable consequence of the principle announced in *Ex parte Young*. . . ." *Edelman v. Jordan*, 415 U.S., *supra*, at 667-668, 94 S.Ct., at 1358, 39 L.Ed.2d, at 675.

In contrast, the Court found the retroactive award to be "in practical effect indistinguishable in many aspects from an award of damages against the State." *Id.*, at 668. Such latter types of awards, of course, have long been held to be prohibited by the Eleventh Amendment. *See, e.g., Great Northern Life Insurance Co. v. Read*, 322 U.S. 47, 64 S.Ct. 873, 88 L.Ed. 1121 (1944).

Given the above general pronouncements, it is plain that while the federal court award of attorneys' fees under consideration here falls somewhere in the twilight between the permissibility of the order in *Ex parte Young* and the invalidity of the award condemned in *Edelman, cf. Edelman v. Jordan*, 415 U.S., *supra*, at 667, 94 S.Ct., at 1357, 39 L.Ed.2d, at 675, its true nature, scope and impact preclude its application to the various unconsenting states.

A. ATTORNEYS' FEE AWARDS ARE A DISTINCT JUDICIAL REMEDY, REFLECTING NON-CONSTITUTIONAL POLICY DETERMINATIONS, AND THUS CANNOT BE IMPOSED IN CONFLICT WITH THE ELEVENTH AMENDMENT

To surmount the bar of the Eleventh Amendment, any fiscal impact upon a state treasury imposed by a federal court must be "the *necessary result* of compliance with

decrees which by their terms were prospective in nature." *Edelman v. Jordan*, 415 U.S., *supra*, at 668, 94 S.Ct., at 1358, 39 L.Ed.2d, at 675 (emphasis added). Under such a standard, the award of attorneys' fees under review cannot stand.

We first note the obvious: in making or approving all the countless orders against the states pursuant to the approved principles of *Ex parte Young*, this Court, with but one exception, has not heretofore required any state to pay an attorneys' fee to the prevailing plaintiff.[3] If

---

3. The exception, of course, is the summary affirmance of *Sims v. Amos*, 340 F.Supp. 691 (M.D.Ala.) (three-judge court), aff'd mem. 409 U.S. 942, 93 S.Ct. 290, 34 L.Ed.2d 215 (1972), a case often cited by lower courts as authority for an award of attorneys' fees by a federal court against a state. *See, e.g.*, the Second Circuit's opinion in this case, *Fitzpatrick v. Bitzer*, 519 F.2d 559, 571 (2 CA; 1975); *Thonen v. Jenkins*, 517 F.2d 3, 7 (4 CA; 1975); *Boston Chapter N.A.A.C.P., Inc. v. Beecher*, 504 F.2d 1017, 1029 (1 CA; 1974), certiorari denied *sub. nom. Director of Civil Service of Massachusetts v. Boston Chapter, N.A.A.C.P., Inc.*, 421 U.S. 910, ... S.Ct. ....., ... L.Ed.2d ..... (1975); *Jordan v. Fusari*, 496 F.2d 646, 651, n. 11 (2 CA; 1974); *Brandenburger v. Thompson*, 494 F.2d 885, 888 (9 CA; 1974); *Gates v. Collier*, 489 F.2d 298, 302 (5 CA; 1973), petition for rehearing en banc granted, 500 F.2d 1382 (5 CA; 1974); *La Raza Unida v. Volpe*, 57 F.R.D. 94, 101, n. 11 (N.D.Ca.; 1972); and *Taylor v. Perini*, 503 F.2d 899, 907 (6 CA; 1974) (Edwards, J., dissenting), vacated on other grounds, 421 U.S. 982, 95 S.Ct. 1985, 44 L.Ed.2d 474 (1975). Cases rejecting *Sims v. Amos* as persuasive authority for such an award include *Jordon v. Gilligan*, 500 F.2d, *supra*, 707-708; and *United States v. State of Washington*, 66 F.R.D. 477, 479-480 (W.D.Wash.; 1974). *See also Skehan v. Board of Trustees of Bloomsburg State College*, 501 F.2d 31 (3 CA; 1974), vacated on other grounds, 421 U.S. 983, 95 S.Ct. 1986, 44 L.Ed.2d 474 (1975), wherein the Third Circuit attributed this Court's failure to overrule its summary affirmance of *Sims v. Amos* in *Edelman* to "inadvertence." *Id.*, 501 F.2d, at 42, n. 7.

There are strong indications that this one exception found in *Sims v. Amos* indeed should not be taken as the Court's ultimate word on the point. Given the absence of any stated reason for this Court's action in *Sims*, the precedential value of that disposition in the face of the constitutional dimensions of the question presented may be considered diminished. *Cf. Edelman v. Jordan*, 415 U.S., *supra*, at 671, 94 S.Ct., at 1359-1360, 39 L.Ed.2d, at 677. And, certainly, we hesitate to afford it dispositive effect in view

compliance with those orders was achieved without the imposition of any attorneys' fees, and we may assume compliance was obtained, it is apparent that an award of attorneys' fees was not a *necessary* prerequisite to such compliance.

More significantly, however, examination of fee awards reveals that their nature is entirely separate from the carrying out of any prospective decree. They are, in fact, a distinct remedy unto themselves, imposed for a variety of non-constitutional policy reasons, none of which bear upon a state's compliance with a decree to enforce constitutionally-based rights.

In *Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975), this Court had occasion to examine the numerous federal doctrines and provisions which justify the award of attorneys' fees generally. *Id.*, 421 U.S. at 257-263, 95 S.Ct., at ....., 44 L.Ed.2d, at ..... Without repeating that discussion, we discern therefrom the following major policies being advanced by Congress and the federal courts in their allowances of such fees:

a. to recompense a party who incurred expenses to secure a protected right;

b. to spread the cost of litigation among all those who benefitted therefrom, avoiding the unjust enrichment of many and sparing one or a few individuals from shouldering the entire expense;

---

of the Court's subsequent decision to hear arguments in this case. Finally, and most importantly, any significance which might have attached to this Court's action in *Sims* was vitiated by its later summary affirmance of *Murgia v. Commonwealth of Mass. Bd. of Retirement*, 386 F.Supp. 179 (D.Mass.; 1974) (three-judge court), aff'd mem. 421 U.S. 972, 95 S.Ct. 1972, 44 L.Ed.2d 464 (1975).

c. to encourage private persons to use the courts to obtain certain rights or to advance particular policies;[4] or

d. to punish a party for unreasonable, vexatious, or obdurate behavior, or for violation of a court order.

The particular policies being advanced by the above bases for awards of attorneys' fees are unrelated to any particular constitutionally-protected right, which rights alone can justify the granting of any relief by a federal court against a state.

Rather, each of the concepts reflects a legislative or judicial determination that one result or course of action among several available alternatives is to be preferred.

For example, this Court's approval of the "common-fund" rationale for awarding attorneys' fees in *Trustees v. Greenough*, 105 U.S. 527, 26 L.Ed. 1157 (1882), was simply a judicial recognition of a particular equitable principle. The Court was under no constitutional compulsion to adopt that principle, but did so apparently because of its belief that the result thereby gained was fairer and thus "better" than another. Had it chosen a different route, we might criticize its choice as unfair or unwise, but we could hardly claim the choice to be unconstitutional.

On examination, all the bases for awarding attorneys' fees fall into the same category: they are but policy choices and, as such, can only be made consistent with the limits set forth in the federal constitution.

---

4. Such a purpose undoubtedly lies behind the Congressional enactment of 42 U.S.C.A. § 2000e-5(k), which statute supports the award reviewed here. *Cf., Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 88 S.Ct. 964, 19 L.Ed.2d 1263 (1968).

Where such a choice would result in an imposition upon the revenues of a non-consenting state, as does the fee award in this case, the clash of that policy decision with the command of the Eleventh Amendment is patent.

B. FEDERAL IMPOSITION OF ATTORNEYS' FEES UPON THE NON-CONSENTING STATES IS UNNECESSARY TO ACHIEVE COMPLIANCE WITH AN OTHERWISE VALID COURT ORDER

Since the non-constitutional policies behind attorneys' fee awards plainly cannot be held to justify the circumvention of the Eleventh Amendment, advocates of the imposition of such fees upon the states have seized upon a more subtle rationale for their position.

It has been contended that, unless attorneys' fees are provided to private parties, few will undertake the litigation to secure their constitutional rights. Thus, it is concluded, awards of such fees are indeed "necessary" to obtain state conformance to federal constitutional standards, and thus they are a permissible effect of a grant of prospective relief, itself valid pursuant to *Ex parte Young*. *See, e.g., Fitzpatrick v. Bitzer,* 519 F.2d, *supra,* at 571; and *Gates v. Collier,* 489 F.2d, *supra,* at 301-302.

The above argument contains several assumptions, however, all of which are critical to its conclusion. The failure of any one of these assumptions requires rejection of the entire thesis. These assumptions include:

a. only private parties can enforce federal constitutional rights against states;

b. only federal forums are available to enforce federal constitutional rights against states; and

c. only by exacting attorneys' fees from the states can the federal judiciary ensure private enforcement of federal constitutional rights.

To state the above premises is to demonstrate their fallacy. As to the first, it is clear the federal government may, consistent with the Eleventh Amendment, act through its own agents to enforce the rights involved. Indeed, the Attorney General of the United States is expressly authorized to enforce against the states the provisions of Title VII of the Equal Employment Opportunity Act, 42 U.S.C.A. § 2000e-5(f), P.L. 92-261, § 4(a), the Act implementing the underlying constitutional right involved in this case. The "necessity" for private enforcement action only appears because Congress has determined, as a matter of policy, not to fund federal enforcement efforts to a sufficient degree, but to rely instead upon private litigants for a portion of the task. *See, e.g.*, House Report No. 92-238, 1972 U.S. Code Cong. and Adm. News 2137, at 2147-2148. No constitutional language dictates such a policy choice nor does any preclude a reversal thereof.[5]

The second assumption, that only the federal courts will provide a forum to those whose federal constitutional rights are impinged upon by states, is belied by the fact that in certain instances Congress has made state courts available to private litigants seeking damages against the states pursuant to federal law. *See Fitzpatrick v. Bitzer*, 519 F.2d, *supra*, at 570-571. Again, the fact that a private litigant seeks relief against a state from a federal court is based on factors unrelated to constitutional requirements.

Finally, as to the last assumption, there are available alternatives to federal court exaction of attorneys' fees for private litigants from non-consenting state defendants. Again, the Equal Employment Opportunity Act provides a solid example.

---

5. It is noteworthy that, should the United States itself seek relief against a state, the protection otherwise afforded a state by the Eleventh Amendment would be of no avail. *United States v. Mississippi*, 380 U.S. 128, 85 S.Ct. 808, 13 L.Ed.2d 717 (1965).

In 42 U.S.C.A. § 2000e-5(f)(1), "Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security." Certainly, under the just-quoted portion of the Act, a state's immunity from an award of attorneys' fees may invoke the federal court's appointment of counsel—at federal expense—for the private litigant.

Harking back to the language of *Edelman*, it is apparent that the fee award in this case is not a *necessary* element of securing a state's prospective compliance with federal law. Other means are available to the federal judiciary to accomplish the same result, but in a manner which would not abrade the delicate federal-state relationship.

The Congressional or judicial determination that a particular approach to enforcement of federal constitutional rights may be more *desirable* than available alternatives cannot justify the federal imposition of attorneys' fee awards upon the states. The constitutional command of the Eleventh Amendment must be respected.

II. There Is No Supreme Court Precedent for the Usurpation of State Sovereignty by the Award of Attorneys' Fees

There remains one final basis which has been claimed as authority for a federal court award of attorneys' fees against a non-consenting state, *i.e.*, this Court's decision in *Fairmont Creamery Co. v. State of Minnesota*, 275 U.S. 70, 48 S.Ct. 97, 72 L.Ed. 168 (1927). *See, e.g., Boston Chapter N.A.A.C.P., Inc. v. Beecher*, 504 F.2d, *supra*, at 1029; and *Souza v. Travisono*, 512 F.2d 1137, at 1139-1140 (1 CA; 1975).

In *Fairmont*, an award of costs by the Supreme Court against a state was upheld, a result which, standing alone,

would appear to lend support to the *Beecher* court's result. But even assuming, arguendo, that attorneys' fees should be identically treated with the costs involved in *Fairmont*, *see Souza v. Travisono*, 512 F.2d, *supra*, at 1140, that decision of the Supreme Court cannot support the claimed circumvention of the Eleventh Amendment.

Most importantly, the language of *Fairmont* relied upon by the First Circuit in *Beecher* and *Souza* is patent dicta. The true basis for the result in *Fairmont* is found at 275 U.S., *supra*, at 73, 48 S.Ct., at 98, 72 L.Ed., at 169-170, where this Court noted it lacked jurisdiction to hear Minnesota's motion to retax the costs imposed since the judgment for costs had previously become final.

". . . [N]ot content to dispose of the motion on this ground alone," *idem*, the Supreme Court went on to explore the merits of the question. The ensuing rationale, it clearly appears, was wholly unnecessary to the result obtained, and thus lacks the precedential value placed upon it by the First Circuit.

But, even if the *Fairmont* dicta should be considered at all, its irrelevance to the Eleventh Amendment question presented in this case is apparent.

The *Fairmont* court concluded its imposition of costs upon Minnesota was proper, and did so without a single allusion to the constitutional language with which this case is concerned. Instead, the Court emphasized the procedural status of the case before it, noting that the costs incurred were the result of litigation brought "by a writ of error issued under the authority of the United States by virtue of the Constitution of the United States." *Id.*, 275 U.S., at 74, 48 S.Ct., at 99, 72 L.Ed., at 170.

Given this emphasis, and also the dearth of any discussion of the Eleventh Amendment, it is apparent the Supreme

Court in *Fairmont* viewed the case as one falling outside the application of that constitutional requirement.

Such a perspective was supported by precedent. In *Cohens v. Virginia,* 19 U.S. (6 Wheat.) 264, 5 L.Ed. 257 (1821), Chief Justice Marshall reached the identical conclusion. At the time *Cohens* was decided, Marshall, ever the Federalist, perceived the danger to the Republic which would flow from an expansive interpretation of the then-recently enacted Eleventh Amendment. Accordingly, he went to elaborate lengths to describe the writ of error in a manner which would remove it from the literal impact of that Amendment:

> "Under the judiciary act, the effect of a writ of error is simply to bring the record into Court, and submit the judgment of the inferior tribunal to re-examination. It does not in any manner act upon the parties; it acts only on the record. . . . . Where, then, a State obtains a judgment against an individual, and the Court, rendering such judgment, overrules a defense set up under the constitution or laws of the United States, the transfer of this record into the Supreme Court, for the sole purpose of inquiring whether the judgment violates the constitution or laws of the United States, can, with no propriety, we think, be denominated a suit commenced or prosecuted against the State. . . . Nothing is demanded from the State. No claim against it of any description is asserted or prosecuted. The party is not to be restored to the possession of any thing." *Cohens v. Virginia,* 19 U.S. (6 Wheat.), *supra,* at 410, 5 L.Ed., at 407.

From the above, it was a simple task for Marshall then to conclude that the writ of error was not governed by the Eleventh Amendment. *Id.,* 19 U.S. (6 Wheat.), at 412, 5 L.Ed., at 411.

Applying Marshall's rationale in *Fairmont*, the Court's only problem in imposing costs on Minnesota was to overcome the common law sovereign immunity of the state, a different concept than that embodied in the Eleventh Amendment.[6] The balance of its opinion, then, is an exposition of the federal authority for the imposition of costs by the Court, since, under the Supremacy Clause, such authority would override any common law immunity otherwise available to Minnesota.

The *Fairmont* case, even expansively read, thus is not an Eleventh Amendment case at all. At best, it continues a highly artificial view of a particular function of the Court, which view was initially created by Marshall for much the same reasons as the Court in *Ex parte Young*, *supra*, employed another fictional device.

However, in cases like the one before the Court now, the reasoning employed by Marshall in *Cohens*, *supra*, cannot apply. Here, unquestionably, the lawsuit is brought by an individual against the state, and thus, the action falls within the Eleventh Amendment. *See, generally, Hans v. Louisiana*, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890). Moreover, specific monetary relief is sought, which relief is payable from the state's treasury, and which would force state officials to adjust their decisions in accordance with the national judiciary's command. *Cf. Land v. Dollar*, 330 U.S. 731, 738, 67 S.Ct. 1009, 91 L.Ed. 1209 (1946).

Given the above, *Fairmont's* supposed support for a federal award of attorneys' fees against a state is as fallacious as any of the other rationales used to buttress such action.

---

6. *See, e.g.*, Note, A Practical View of the Eleventh Amendment —Lower Court Interpretations and the Supreme Court's Reaction, 61 Georgetown L.J. 1473, 1480-1481 (1973).

CONCLUSION

On examination, neither precedent nor logic supports a federal court's award of attorneys' fees against a non-consenting state. Rather, such conduct demonstrates a classic and impermissible involvement of the national judiciary in the revenue decisions of a sovereign entity.

As such, the decision of the Second Circuit reviewed here, insofar as it purports to assess any fees against the State of Connecticut, should be reversed.

Respectfully submitted,

EVELLE J. YOUNGER,
Attorney General of the State of California

N. EUGENE HILL,
Assistant Attorney General

EDMUND E. WHITE,
Deputy Attorney General

RICHARD M. SKINNER,
Deputy Attorney General

Attorneys for the State of California
Amicus Curiae on behalf of
Petitioners

Supreme Court, U. S.
FILED
FEB 13 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

No. 75-283

FREDERICK BITZER, et al.,

Petitioners,

vs.

DONALD MATTHEWS, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF ATTORNEY GENERAL OF THE STATE OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Amicus Curiae
Office & P. O. Address
Two World Trade Center
New York, New York 10047
Tel. No. (212) 488-6044

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

LILLIAN Z. COHEN
Assistant Attorney General
of Counsel

TABLE OF CONTENTS

PAGE

Statement of Interest of *Amicus* State of New York 1

POINT I—The decision below, awarding attorneys' fees to the plaintiffs which must be paid with State funds, is contrary to the language and the spirit of this Court's decision in *Edelman* v. *Jordan* 2

POINT II—The provision for attorneys' fees contained in Title VII of the Civil Rights Act of 1964 is not a basis for an award of fees payable out of State funds 7

Conclusion 13

Cases

Alyeska Pipeline Service Co. v. *Wilderness Society*, 421 U.S. 240 (1975) 4, 5, 6

Anderson v. *Tennessee Office of Economic Opportunity*, 384 F. Supp. 788 (D.C. Tenn. 1974) 11

Class v. *Norton*, 505 F. 2d 123 (2d Cir. 1974) 4

Edelman v. *Jordan*, 415 U.S. 651 (1974) 2, 3,4, 6, 12

Employees v. *Department of Public Health and Welfare*, 411 U.S. 279 (1973) 11

Ex parte Young, 209 U.S. 123 (1908) 12

Fairmont Creamery Co. v. *Minnesota*, 275 U.S. 70 (1928) 512 F. 2d at 1140 5

PAGE

Goldberg v. *Kelly*, 397 U.S. 254 (1970) 6

Hall v. *Cole*, 412 U.S. 1 (1973) 6

Holmes v. *New York City Housing Authority*, 398 F. 2d 262 (2d Cir. 1968) 6

Maryland v. *Wirtz*, 392 U.S. 183 (1968) 10

McNeese v. *Board of Education*, 373 U.S. 668 (1961) 6

Monroe v. *Pape*, 365 U.S. 167 (1961) 6

Morgan v. *Katzenbach*, 384 U.S. 641 (1966) 11

Newman v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968) 6

Rothstein v. *Wyman*, 407 F. 2d 226 (2d Cir. 1972), *cert. denied* 411 U.S. 921 (1973) 7, 11

Scheuer v. *Rhodes*, 416 U.S. 232 (1974) 3

Sims v. *Amos*, 340 F. Supp. 691 (M.D. Ala.), affd. 409 U.S. 942 (1972) 4

Sostre v. *McGinnis*, 442 F. 2d 178 (2d Cir. 1971) *(in banc), cert. denied sub nom. Sostre* v. *Oswald*, 404 U.S. 1049 (1972) 6

Souza v. *Travisono*, 512 F. 2d 1137 (1st Cir. 1975) .. 4, 5

United States v. *Mississippi*, 380 U.S. 128 (1965) ... 10

Younger v. *Harris*, 401 U.S. 37 (1971) 7

Statutes

N. Y. Executive Law § 63 1

Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, et seq. 7, 8, 10, 11, 12

Civil Rights Act, 42 U.S.C. §§ 1981 and 1983 9

Miscellaneous

PAGE

1972 U.S. Code Cong. & Admin. News, p. 2137 ..... 9, 12

Legislative History of the Equal Employment Opportunity Act of 1972, p. 410 .....9, 10, 12

IN THE

Supreme Court of the United States

No. 75-283

FREDERICK BITZER, et al.,

Petitioners,

vs.

DONALD MATTHEWS, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF ATTORNEY GENERAL OF THE STATE OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Statement of Interest of *Amicus* State of New York

The petitioners are asking this Court to determine whether the Eleventh Amendment bars an award of attorneys' fees against defendant State officials because such fees are to be paid out of the State's treasury. This question is of direct and substantial interest to the Attorney General of the State of New York. As the State's chief legal officer (N.Y. Executive Law § 63), the Attorney General is charged, *inter alia,* with the defense

of "all actions in which the state is interested". He is therefore charged with defending State officials who are sued in federal courts and with protecting all aspects of the State's sovereignty in those suits.

It is a well known fact that, in recent years, the number of actions filed in federal courts against State officials has burgeoned. A rule permitting an award of attorneys' fees in such cases would, therefore, result in a substantial invasion of the State's treasury which is unnecessary to the vindication of federal rights. Accordingly, we join the State of Connecticut in urging this Court to reverse the decision below insofar as it awards attorneys' fees payable with State funds.

POINT I

The decision below, awarding attorneys' fees to the plaintiffs which must be paid with State funds, is contrary to the language and the spirit of this Court's decision in *Edelman* v. *Jordan*.

In *Edelman* v. *Jordan*, 415 U.S. 651 (1974), this Court held that, absent consent by the State, the Eleventh Amendment bars an award to private parties of retroactive welfare benefits payable out of State funds. This type of payment, however, was distinguished from the expenditure of State funds as a "*necessary* result of compliance with decrees which by their terms [are] prospective in nature." 415 U.S. at 668 (emphasis supplied). Such "necessary" and "often . . . inevitable" expenditures by State officials in giving effect to the mandate of a federal court have "an ancilliary" effect on the State treasury which the Eleventh Amendment does not bar.

The effect of the retroactive-prospective distinction—although not expressed in the Court's opinion—is to serve the interests of federalism. It assures, on the one hand, that the states will comply in the future with federal law

and, on the other, that there will be the least possible interference with proper State functions.

An award of attorneys' fees against the State does nothing to preserve the interests of federalism. On the contrary, it directly impinges upon the State's fiscal independence and, to the extent that it carries a threat for the future, acts as a restraint on State officials, not only in the performance of their duties, but in their conduct of the litigation against them as well.* Compare *Scheuer* v. *Rhodes,* 416 U.S. 232 (1974).

The court below, in holding that the plaintiffs were not entitled to payment of retroactive retirement benefits, stressed its concern with maintaining the "balance between enforcement of individual constitutional rights and protection of the State's fiscal administration under the Eleventh." Paradoxically, however, although the Court's reasoning applies equally to an award of attorneys' fees, the opinion makes no reference to the Court's earlier concern with the tension between the Eleventh and Fourteenth Amendments. Instead, the Court summarily awarded fees on the ground that they were ancillary to the prospective injunctive relief, i.e. "[i]n order to invoke the court's power to enjoin such future illegal conduct, it was necessary to incur costs and attorneys' fees."

The Court's reasoning is defective in several respects. First, it goes well beyond the plain meaning of this Court's language in *Edelman.* Just as the expenditure by the State of State funds in payment of attorneys' fees is not a "necessary" or "inevitable" consequence of injunctive relief, an

---

* Just as the prospect of attorneys' fees may act as an incentive to sue, from the defendant's standpoint, they may act as an incentive to settle. Where the defendant is a State official carrying out, in good faith, a public policy adopted by the State, he should be free to defend that policy without having to fear that his decision to do so may have an additional and often significant effect on the State's treasury.

award of fees is not a "necessary" device to obtain relief against the State. For example, the plaintiff may be financially able to pay his attorney or the attorney may be institutionally funded. Moreover, although attorneys' fees must be incurred in the course of obtaining future relief, this expenditure would not have been required in the first place had there been no "*past* breach of a legal duty on the part of the defendant State officials". *Edelman* v. *Jordan*, 415 U.S. at 668 (emphasis supplied). In this sense, they more closely resemble "a form of compensation" and run afoul of *Edelman*. *Ibid.*

Certainly, the cases relied upon by the Circuit Court are no authority for its interpretation of *Edelman*. *Class* v. *Norton*, 505 F. 2d 123 (2d Cir. 1974) is easily distinguishable since the fees there were not awarded as a consequence of bringing the original action, but as a "necessary result of attempts to gain compliance with a [prospective] decree" which had already been obtained by the plaintiffs. 505 F. 2d at 127. The viability of the other two cases relied upon by the Court was undermined three weeks after the decision below by this Court's decision in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975). *Sims* v. *Amos*, 340 F. Supp. 691 (M.D. Ala.), *aff'd.* 409 U.S. 942 (1972), in which an award of fees was summarily affirmed before *Edelman* and which, because it was not expressly disavowed in *Edelman* has been relied upon to justify fee awards, was distinguished on the ground that the "District Court [there] indicated that there was an alternative ground available—the bad faith of the defendants—upon which to base the award of fees." 421 U.S. at 270, n. 46. In the instant case, there is no suggestion of bad faith. The other case, *Souza* v. *Travisono*, 512 F. 2d 1137 (1st Cir. 1975) was one of several decisions criticized by this Court because of the reasoning used to support an award of fees. *Ibid.*

In *Souza*, the First Circuit held that an award of costs was appropriate under the private attorney general

theory. The Court concluded that such an award was not barred by the Eleventh Amendment on the ground that fees are "generically" the same as costs and costs against the State were approved by this Court in *Fairmont Creamery Co.* v. *Minnesota,* 275 U.S. 70 (1928). 512 F. 2d at 1140. However, *Fairmont Creamery* is dubious precedent in cases like *Souza* and the instant case since it originated as a criminal prosecution by the State and, therefore, technically was not "commenced or prosecuted against" the State as contemplated by the Eleventh Amendment. Moreover, to the extent that fees are awarded as an incentive to sue, as in *Souza,* attorneys' fees may not be equated with ordinary costs of litigation such as the expense of printing the record.

A second defect in the reasoning of the Court below is that, logically, the successful plaintiff would always be entitled to fees because litigation always involves costs and attorneys' fees as an incident to obtaining relief. Such a rule may only be characterized as a "drastic" departure from the traditional American view that attorneys' fees are not ordinarily recoverable. See *Alyeska Pipeline Service Co.* v. *Wilderness Society,* 421 U.S. 240, 269 (1975).

Finally, the decision below fails to examine the nature of an award of attorneys' fees, an omission which is particularly unreasonable given the fact that the State's interests under the Eleventh Amendment are at stake. Although they may not be expressed, there are many facets to an award of fees. For example, in addition to the element of compensation, referred to *supra,* there is always a punitive element inherent in an award of fees. As a consequence, whenever an award is made against a State official and, as in the instant case, there is no suggestion of bad faith, the State is, in essence, being punished simply because it has defended its statute or action or policy and has lost. This result hardly squares with the strict interpretation given the "American rule" regarding fee

awards. See *Hall* v. *Cole*, 412 U.S. 1, 5 (1973) (the unsuccessful party must have acted "'in bad faith, vexatiously, wantonly, and for oppressive reasons'").

The most important element of a fee award in a case like the instant one, however, is to encourage litigants to bring suits to vindicate a public interest. See *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968). This basis for awarding fees, which has come to be called the private attorney general theory, was rejected by this Court where a private party is liable for the fees. *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975). There is even less justification for relying on this theory in a case involving the State.

At a time when the number of lawsuits attacking State activities continues to increase and determinations by federal courts are affecting virtually all areas of State interest (See *Monroe* v. *Pape*, 365 U.S. 167 [1961] [police procedures for search, arrest and detention]; *McNeese* v. *Board of Education*, 373 U.S. 668 [1961] [education]; *Goldberg* v. *Kelly*, 397 U.S. 254 [1970] [welfare]; *Holmes* v. *New York City Housing Authority*, 398 F. 2d 262 [2d Cir. 1968] [public housing]; *Sostre* v. *McGinnis*, 442 F. 2d 178 [2d Cir. 1971] [*in banc*], *cert. denied sub nom. Sostre* v. *Oswald*, 404 U.S. 1049 [1972] [prisoners' rights]), we believe that awards of fees would aggravate already existing friction. This Court should not lose sight of the fact that State officials are particularly vulnerable defendants who are frequently the objects of insubstantial lawsuits. The potential availability of fee awards could not help but encourage an increase in this type of litigation. Moreover, as a practical matter, there is no countervailing deterrence to such litigation because so many suits are brought by indigent plaintiffs as against whom costs and fees are uncollectable.

In *Edelman* v. *Jordan* this Court concluded that effectuation of federal law did not require an award of retro-

active benefits payable out of the State's treasury. *A fortiori,* it does not require that attorneys' fees, payable from the same source, be awarded to plaintiffs as a reward for initiating the litigation. As the late Mr. Justice Black aptly observed in discussing the concept of federalism:

> "The concept [of federalism] does not mean blind deference to 'States' Rights' any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Government, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States."

Younger v. *Harris,* 401 U.S. 37, 44 (1971). See also *Rothstein* v. *Wyman,* 407 F. 2d 226, 236 (2d Cir. 1972), *cert. denied* 411 U.S. 921 (1973).

POINT II

The provision for attorneys' fees contained in Title VII of the Civil Rights Act of 1964 is not a basis for an award of fees payable out of State funds.

Although the District Court granted injunctive relief based upon a violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.,* as amended, an award of attorneys' fees payable out of the State's treasury may not be made under the attorneys' fees provision of that statute. There are two barriers to such an award. The first is that Congress, in amending Title VII in 1972, did not evidence an intent that fees be awarded as against State defendants. The second is that Congress did not abrogate the States' immunity under the Eleventh Amendment.

In 1972 Congress amended Section 701 of the Civil Rights Act of 1964 to include State and local governments, governmental agencies and political subdivisions as "employers" under Title VII. The plaintiffs have urged that this expansion of Title VII's coverage entitles them to avail themselves of all remedies afforded by the Act, which would include § 2000e-5(k), the provision authorizing attorneys' fees. The relevant legislative history fails to support this view.

After citing statistics with regard to discrimination in government employment, the House Report states:

> "While an individual has a right of action in the appropriate court if he has been discriminated against, the adequacy of protection against employment discrimination by state and local governments has been severely impeded by the failure of Congress to provide Federal *administrative machinery* to assist the aggrieved employee.
>
> • • •
>
> The committee feels that it is an injustice to provide employees in the private sector with an *administrative forum* in which to redress their grievances while at the same time, denying a similar protection to the increasing number of state and local employees. Accordingly, H.R. 1746 provides the *administrative remedies* available to employees in the private sector should be extended to state and local employees.
>
> • • •
>
> Inclusion of state and local employees among those enjoying the protection of Title VII provides an alternate *administrative remedy* to the existing prohibition against discrimination perpetuated 'under color of state law' as embodied in the Civil Rights Act of 1871, 42 U.S.C. § 1983. In extending Title VII coverage, the Committee recognizes that States frequently can best deal with violations which occur within their boundaries

> and has, accordingly, retained the provisions of Section 706(b) of the present Act (706(c) under the bill) whereby the Commission will defer to appropriate State agencies cases where the State or local agency can grant the complainant relief similar to that which he can obtain with the Commission under the provisions of this bill." House Rep. No. 92-238 (92nd Cong., 1st Sess. 1971), 1972 U.S. Code Cong. & Admin. News at 2153-2154. (emphasis supplied).

Significantly, although there are references to the individual's rights to sue under §§ 1981 and 1983 of the Civil Rights Act, indicating that Congress considered the nature of existing judicial relief available to employees suing the State, the Report confines itself to expressing the Committee's intention that the 1972 amendments would not "preempt" those remedies. 1972 U.S. Code Cong. & Admin. News at 2154. Surely if Congress had any intention of expanding those judicial remedies, this would have been the place to say so. Yet the Report indicates no such intention, let alone does it make any reference to the difficulties which might arise because of the Eleventh Amendment.

The Senate Committee Report similarly states the Committee's belief

> "that it is an injustice to provide employees in the private sector with the assistance of an agency of the Federal Government in redressing their grievances while at the same time denying assistance similar to State and local government employees."

Senate Report No. 92-415 (92d Cir. 1st Sess. 1971) in *Legislative History of the Equal Employment Opportunity Act of 1972* at 419-420.

Although the Report raises the question of the states' sovereignty, it does so simply in the context of the power of Congress to include state and local employees in the

Act at all. Thus, it is clear from the language which the Committee quoted from this Court's opinion in *Maryland* v. *Wirtz*, 392 U.S. 183 (1968), that the Committee's concern was with whether the State " 'may be forced to conform its activities to Federal Regulation.' " (at 420).

As in the case of the House Report, there is no indication that the Committee addressed itself to the problems of sovereignty which would be occasioned by authorizing money awards such as attorneys' fees. Nor is there any reference to an intention to expand the judicial relief available before the amendments except for a discussion of the new powers of the Attorney General to bring civil action against State and local agencies engaged in unlawful employment practices.*

In light of this legislative silence, this Court should reject any argument that Title VII authorizes an award of fees against a State defendant, particularly since Congress did not alter the provisions of § 2000e-5(k) when it

---

* That the Committee was concerned with minimizing the impact of the amendments on the federal system is evident at page 434 of the *Legislative History* where the Report states that, in the Committee's view, enforcement by the Attorney General:

> "provides the necessary power to achieve results without the needless friction that might be created by a Federal executive agency issuing orders to sovereign states and their localities. In short, the committee believes that the objective of equal employment opportunity can best be achieved by providing this particular means of enforcement where State or local government units fail to comply with the law."

Earlier in its Report, in discussing private civil actions, the Committee stated its expectation that "recourse to this remedy will be the exception and not the rule, particularly once the Commission's enforcement procedures are fully operational" (at 432). Read together with the above statements as to the Attorney General's role, it is apparent that the Committee did not concern itself with the Eleventh Amendment because it expected that judicial enforcement would largely be undertaken by the Attorney General as against whom the Eleventh Amendment is inapplicable. *United States* v. *Mississippi*, 380 U. S. 128, 140-141 (1965).

acted in 1972. See *Employees* v. *Department of Public Health and Welfare,* 411 U.S. 279 (1973) in which this Court held that Congress, in amending the Fair Labor Standards Act to include state-operated hospitals and their employees, had not sufficiently expressed its intention to abrogate the State of Missouri's immunity. The Court there relied, *inter alia,* on the failure to change the remedial provisions of § 16(b) in amending the Act.

Assuming *arguendo,* however, that Congress intended that fee awards be made against the State such relief is barred by the Eleventh Amendment. Plaintiffs have argued that Congress, acting under Section 5 of the Fourteenth Amendment, has the power to abrogate the State's Eleventh Amendment immunity. However, that question has yet to be decided by this Court. Moreover, even if Congress has such power in particular circumstances, we believe that a statute authorizing the award of attorneys' fees would not be "appropriate legislation" under Section 5. See *Rothstein* v. *Wyman,* 467 F. 2d 226, 237 (2d Cir. 1972), *cert. denied* 411 U.S. 921 (1973); *Anderson* v. *Tennessee Office of Economic Opportunity,* 384 F. Supp. 788 (D.C. Tenn. 1974).

Section 5 provides that "the Congress shall have power to enforce, by appropriate legislation, the provisions of this article." In *Morgan* v. *Katzenbach,* 384 U.S. 641 (1966), this Court set forth three criteria for determining what is "appropriate legislation" under Section 5: (1) whether the statute is a measure enacted "to enforce the guarantees of the amendment"; (2) "whether it is 'plainly adapted to that end'" and (3) "whether it is not prohibited by but is consistent with the letter and spirit of the Constitution". 384 U.S. at 641. An award of attorneys' fees under Title VII payable out of state funds cannot be sustained under these criteria.

Granting that Title VII and its amendments were enacted to enforce rights secured by the Fourteenth

Amendment, a discretionary award of fees simply as an encouragement to other litigants is, at best, an incidental device for attaining that end and hardly a sufficient basis for sacrificing the State's constitutional grant of immunity. Nor, in any real sense, is such an award consistent with the letter or spirit of the Constitution as interpreted by this Court in *Ex parte Young*, 209 U.S. 123 (1908) and *Edelman* v. *Jordan*, 415 U.S. 651 (1974). See Point I, *supra*. Indeed, it is incongruous to use State funds to pay attorneys as an inducement to them and others to bring suits against the State.

This view of attorneys' fees as a mere incident to the enforcement of rights under Title VII is consistent with the overriding purpose of enacting the 1972 Amendments, i.e., to provide the Equal Employment Opportunity Commission with enforcement powers which it previously did not have. Rather than seeking to encourage litigation against employers, it is evident that Congress was anxious to avoid it. Both the House and Senate Reports stated a preference for administrative review of claims, emphasizing agency expertise and flexibility. Moreover, both Reports express concern that existing calendar congestion in the federal courts would delay resolution of claims if the judicial system were the primary enforcement mechanism. 1972 U.S. Code Cong. & Admin. News at 2146; *Legislative History of the Equal Employment Opportunities Act of 1972* at 427.

Accordingly, we believe that an award of fees under Title VII cannot be sustained, and that the decision below, approving an award of attorneys' fees, should be reversed.

CONCLUSION

The decision below should be reversed insofar as it approves an award of attorneys' fees to plaintiffs' counsel.

Dated: New York, New York, February 13, 1976.

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Amicus Curiae

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

LILLIAN Z. COHEN
Assistant Attorney General
of Counsel

Supreme Court, U. S.
FILED
FEB 12 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-283

FREDERICK BITZER, Chairman of the State Employees' Retirement Commission, ROBERT I. BERDON, Treasurer of the State of Connecticut, and NATHAN G. AGOSTINELLI, Comptroller of the State of Connecticut,
Petitioners,

vs.

DONALD MATTHEWS, MORTIMER COVERT,
Respondents.

BRIEF OF THE STATE OF CALIFORNIA AMICUS CURIAE IN SUPPORT OF PETITIONERS

EVELLE J. YOUNGER,
Attorney General of the State of California.
JACK R. WINKLER,
Chief Assistant Attorney General—
Criminal Division.
EDWARD P. O'BRIEN,
Assistant Attorney General.
GLORIA F. DEHART,
Deputy Attorney General.
PATRICK G. GOLDEN,
Deputy Attorney General.
6000 State Building,
San Francisco, California 94102,
Telephone: (415) 557-2653.
Attorneys for Amicus Curiae State of California.

PERNAU-WALSH PRINTING CO. - 863 MISSION STREET - SAN FRANCISCO, CA 94103

Subject Index

Page

Interest of amicus curiae 1

Summary of argument 2

Argument 3

I

Recovery of attorneys' fees from the state is barred by the Eleventh Amendment 4

II

The Eleventh Amendment bar to an award of attorneys' fees against a state has not been modified by the Fourteenth Amendment 10

III

A state does not lose its protection under the Eleventh Amendment absent a clear declaration to submit itself to suit in Federal Court 11

IV

An award of attorneys' fees against a state may not be predicated upon the common fund or bad faith exceptions to the American rule prohibiting an award of attorneys' fees 12

Conclusion 15

Table of Authorities Cited

Cases	Pages
Alyeska Pipeline Co. v. Wilderness Society, 421 U.S. 410 (1975)	3, 4, 12, 13
Chandler v. Dix, 194 U.S. 590 (1903)	12
Class v. Norton, 505 F.2d 123 (2d Cir. 1974)	7
Cohens v. Virginia, 6 Wheat. (19 U.S.) 264 (1821)	9
Edelman v. Jordan, 415 U.S. 651 (1974)	2, 4, 6, 7, 8, 10, 12, 14
Ex parte Young, 209 U.S. 123 (1908)	5, 8
Fairmont Creamery Co. v. Minnesota, 275 U.S. 70 (1927)	9, 10
Fitzpatrick v. Bitzer, 519 F.2d 559 (2nd Cir. 1975)	10
Great Northern Ins. Co. v. Read, 322 U.S. 47 (1944)	12
Hallmark Clinic v. North Carolina Dept. of Hum. Res., 519 F.2d 1315 (4th Cir. 1975)	7
Jordan v. Fusari, 496 F.2d 646 (2d Cir. 1974)	7
Jordon v. Gilligan, 500 F.2d 701 (6th Cir. 1974), cert. denied 421 U.S. 991	7
Murgia v. Commonwealth of Mass. Bd. of Retirement, 386 F.Supp. 179 (D.Mass. 1974), judgment affirmed, 421 U.S. 972	7
Named Ind. Mem., San Antonio Con. Soc. v. Texas Hwy. Dept., 496 F.2d 1017 (5th Cir. 1974), cert. denied 420 U.S. 926	7
Schuerer v. Rhodes, 416 U.S. 232 (1973)	14
Skehan v. Board of Trustees, 501 F.2d 31 (1974), vacated 421 U.S. 983	7
Smith v. Reeves, 178 U.S. 436 (1899)	12
Souza v. Travisono, 512 F.2d 1137 (1st Cir. 1975), remanded ..... U.S. ....., ... S.Ct. ....., 44 U.S.L.Week 3198-3199	7, 8
Sprague v. Ticonic Bank, 307 U.S. 161 (1939)	9
Swanson v. American Consumer Industries, Inc., 517 F.2d 555 (7th Cir. 1975)	9

Pages

Taylor v. Perini, 503 F.2d 899 (6th Cir. 1974), vacated 421 U.S. 982 7
Townsend v. Edelman, 518 F.2d 116 11

Codes

California Government Code, Sections 825, et seq. 1

Constitutions

United States Constitution:
Eleventh Amendment 2, 3, 4, 5, 6, 9, 10, 11, 12, 13, 14, 15
Fourteenth Amendment 2, 10

Rules

Federal Rules of Civil Procedure, Rule 25(d) 14

Statutes

42 U.S.C.:
Section 1983 ..... 6, 9
Sections 2000a, et seq. 3
Section 2000e-5(k) 3, 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-283

FREDERICK BITZER, Chairman of the State Employees' Retirement Commission, ROBERT I. BERDON, Treasurer of the State of Connecticut, and NATHAN G. AGOSTINELLI, Comptroller of the State of Connecticut,
Petitioners,

vs.

DONALD MATTHEWS, MORTIMER COVERT,
Respondents.

BRIEF OF THE STATE OF CALIFORNIA AMICUS CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE

The State of California employs over 130,000 persons and, under state law, defends any employee or former employee against any claim or action arising out of an act or omission occurring within the scope of his employment. Calif. Gov. Code § 825, et seq. Imposition of attorneys' fees, even in a small per-

centage of cases, will have a direct and significant impact on the funds and fiscal management of the State of California. Resolution of the Eleventh Amendment issue in relation to a federal court's power to grant attorneys' fees against a state official is, therefore, of significant interest to amicus.

SUMMARY OF ARGUMENT

The Eleventh Amendment to the United States Constitution bars the recovery of attorneys' fees from a state treasury. Those circuits which have held otherwise have misconstrued this Court's opinion in *Edelman v. Jordan,* 415 U.S. 651 (1974). This conclusion cannot be altered by labeling an award of attorneys' fees against the state an "equitable remedy" or a "taxation of costs."

The fact that the Fourteenth Amendment was enacted after the Eleventh Amendment does not grant Congress the power to impose attorneys' fees against a state. By allowing actions against state officials for injunctive prospective relief, while limiting relief to exclude retroactive monetary awards and attorneys' fees, a reasonable balance is struck between the need for obtaining relief from state officials and the Eleventh Amendment right of the states not to have their public treasuries severely depleted.

The State of Connecticut has not waived its protection under the Eleventh Amendment, as there is no clear showing that Connecticut has consented to be sued in the federal court or has expressed a waiver

of its immunity from suit with respect to Title VII of the Civil Rights Act, 42 United States Code section 2000a, et seq.

An award of attorneys' fees against the state officials cannot be predicated upon the common fund or bad faith exceptions to the American rule prohibiting the award of attorneys' fees. The common fund theory is inappropriate, because no fund will be available from which to reimburse litigants. The bad faith exception cannot support an award of attorneys' fees against the state official in a suit seeking injunctive relief, as the state is the real party in interest and as any award of attorneys' fees would have a direct impact on the state treasury.

ARGUMENT

After this Court's decision in *Alyeska Pipeline Co. v. Wilderness Society,* 421 U.S. 410 (1975), attorneys' fees may not be awarded by a federal court to a prevailing party based on a private attorney general theory. In *dicta,* this court appears to recognize that attorneys' fees can be awarded from a common fund or when the losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons. In the instant case, while there is statutory authority for an award of attorneys' fees (42 U.S.C. § 2000e-5(k)), amicus submits that Congress has no power, because of the Eleventh Amendment, to extend the scope of federal jurisdiction and allow an award of attorneys' fees against a state. Amicus also submits that, because

of the Eleventh Amendment, the recovery of attorneys' fees from a state cannot be predicated upon the common fund or bad faith exceptions to the American rule as announced in *Alyeska*.

I

RECOVERY OF ATTORNEYS' FEES FROM THE STATE IS BARRED BY THE ELEVENTH AMENDMENT

The Eleventh Amendment to the United States Constitution, ratified in 1798, and unchanged since, provides:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by Citizens or subjects of any Foreign State."

This Court has consistently held that an unconsenting state is immune from suits brought in federal courts by her own citizens as well as by citizens of another state. *Edelman v. Jordan,* 415 U.S. 651, 662-663 (1974). In the instant case, although the State of Connecticut was not named the defendant, any monetary award for attorneys' fees will obviously not be paid out of the pocket of the defendants, but will have a direct impact on the funds and fiscal management of the State of Connecticut. *See Edelman v. Jordan, supra* at 665.

In *Edelman,* this Court held that retroactive payment of welfare benefits wrongfully withheld by state

officials was barred by the Eleventh Amendment. *Id.* at 662-669. In so holding, this Court stated:

> "'[W]hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants.' Thus, the rule has evolved that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment." (Citations omitted). *Id.* at 663.

In so ruling, this Court specifically distinguished *Ex parte Young*, 209 U.S. 123 (1908):

> "But the relief awarded in *Ex parte Young* was prospective only; the Attorney General of Minnesota was enjoined to conform his future conduct of that office to the requirement of the Fourteenth Amendment. Such relief is analogous to that awarded by the District Court in the prospective portion of its order under review in this case.
>
> But the retroactive portion of the District Court's order here, which requires the payment of a very substantial amount of money which that court held should have been paid, but was not, stands on quite different footing. These funds will obviously not be paid out of the pocket of petitioner Edelman." *Id.* at 664.

This Court also held that labeling an award "equitable restitution" does not evade the Eleventh Amendment bar. *Id.* at 665-666. Further, it was held that the State of Illinois did not waive its Eleventh

Amendment protection or consent to be sued because it had participated in a federal AABD program. *Id.* at 671-677.

Finally, the majority opinion in *Edelman* dealt directly with suits brought under Title 42, United States Code section 1983, stating:

> "It is, of course, true that *Rosado v. Wyman,* 397 U.S. 397 [25 L.Ed.2d 442, 90 S.Ct. 1207] (1970), held that suits in federal court under § 1983 are proper to secure compliance with the provisions of the Social Security Act on the part of participating States. But is has not heretofore been suggested that § 1983 was intended to create a waiver of a State's Eleventh Amendment immunity merely because an action could be brought under that section against state officers, rather than against the State itself. Though a § 1983 action may be instituted by public aid recipients such as respondent, a federal court's remedial power, consistent with the Eleventh Amendment, is necessarily limited to prospective injunctive relief, *Ex parte Young, supra,* and may not include a retroactive award which requires the payment of funds from the state treasury, *Ford Motor Co. v. Department of Treasury, supra.*" (Footnote omitted) *Id.* at 675-677.

Amicus submits that the rationale of *Edelman* applies to respondents' request for attorneys' fees. There is no doubt, as in *Edelman,* that petitioners will not be held personally accountable for such award. Despite individual defendants named, an award of attorneys' fees would have a direct impact upon the funds and fiscal management of the State of Connec-

ticut. Any award of attorneys' fees against a state official in such circumstances would impose an unconstitutional burden on a state treasury.

Accordingly, it has been held that the *Edelman* decision compels the conclusion that the Eleventh Amendment bars the recovery of attorneys' fees against a state. *Jordon v. Gilligan,* 500 F.2d 701 (6th Cir. 1974), *cert. denied,* 421 U.S. 991. *Accord, Taylor v. Perini,* 503 F.2d 899, 901, 905 (6th Cir. 1974), *vacated on other grounds* at 421 U.S. 982; *Skehan v. Board of Trustees,* 501 F.2d 31 (1974), *vacated on other grounds* at 421 U.S. 983; *Named Ind. Mem., San Antonio Con. Soc. v. Texas Hwy. Dept.,* 496 F.2d 1017 (5th Cir. 1974), *cert. denied,* 420 U.S. 926; *Hallmark Clinic v. North Carolina Dept. of Hum. Res.,* 519 F.2d 1315, 1317 (4th Cir. 1975). Significantly, this Court has summarily affirmed a decision of a three-judge district court in the First Circuit which denied an award of attorneys' fees both as a matter of law and discretion. *Murgia v. Commonwealth of Mass. Bd. of Retirement,* 386 F.Supp. 179 (D.Mass. 1974), *judgment affirmed,* 421 U.S. 972.

Amicus recognizes that some circuits have taken the position that an award of attorneys' fees is permissible, on the grounds that such an award has only an "ancillary effect on the state treasury" resulting from compliance with the order of injunctive relief. *Jordan v. Fusari,* 496 F.2d 646 (2d Cir. 1974); *Class v. Norton,* 505 F.2d 123 (2d Cir. 1974); *Souza v. Travisono,* 512 F.2d 1137 (1st Cir. 1975), remanded on other grounds, ... U.S. ....., ... S.Ct. ....., 44

U.S.L.Week 3198-3199. However, an analysis of *Edelman* does not support the conclusion of these circuits. This Court in *Edelman* did not leave at large what was meant by the phrase "ancillary effect." The phrase comes at the end of a paragraph at 415 U.S. 667-668 in which this Court discusses *Ex parte* Young, 209 U.S. 123 (1908), as well as two of this Court's more recent welfare cases, and notes that the decrees in those cases would have an effect on the states' funds. "But," this Court stated, "the fiscal consequences to state treasuries in these cases were the necessary result of compliance with decrees which by their terms were prospective in nature." 415 U.S. at 667-668. This is the "ancillary effect" that this Court describes as permissible.

In the next paragraph, this Court distinguished the decree it was reviewing from those it had referred to:

> "It requires payment of state funds, not as a necessary consequence of compliance in the future with the substantive federal-question determination, but as a form of compensation to those whose applications were processed on the slower time schedule at a time when petitioner was under no court-imposed obligation to conform to a different standard." 415 U.S. at 668.

It can hardly be argued that an award of attorneys' fees can be classified *as a "necessary consequence of compliance in the future* with a substantive federal-question determination. . . ."

The argument has also been made that since an award of attorneys' fees resembles more closely the in-

cidental costs sanctioned by this Court in *Fairmont Creamery Co. v. Minnesota*, 275 U.S. 70 (1927), such an award is permitted by the Eleventh Amendment. However, this argument must fail for several reasons. First, an award of attorneys' fees has been regarded by this Court as quite unlike an award of taxable costs. *Sprague v. Ticonic Bank*, 307 U.S. 161 (1939). This distinction has been followed by circuit courts. *See, e.g., Swanson v. American Consumer Industries, Inc.*, 517 F.2d 555, 559-560 (7th Cir. 1975). Secondly, while it is quite true that in *Fairmont, supra,* this Court held that costs could be taxed against Minnesota, it is noteworthy that in that case there is no mention of the Eleventh Amendment. *Fairmont* involved review of a state court decision affirming a criminal conviction. The Eleventh Amendment was not discussed because it had no possible application. The amendment speaks only to suits "commenced or prosecuted *against* one of the united states. . . ." It does not reach a prosecution commenced by the state itself. A state cannot insulate itself from review of its criminal convictions, when they are attacked on federal constitutional grounds, by arguing that under the Eleventh Amendment this Court has no jurisdiction. This much has been settled since the landmark case of *Cohens v. Virginia*, 6 Wheat. (19 U.S.) 264 (1821). Unlike *Fairmont Creamery*, the *civil* suit in the instant case was commenced *against* Connecticut. *Fairmont Creamery* has no application to suits *(i.e.*, Title VII, 42 U.S.C. § 1983) commenced *against* a state.

In any event, any argument that *Fairmont Creamery* supports the imposition of attorneys' fees against the state has been put to rest by this Court in *Edelman v. Jordan, supra.* Labeling attorneys' fees as "costs" is as much an evasion of the Eleventh Amendment as labeling retroactive damages "equitable restitution." *Edelman, supra,* at 665-666.

II

THE ELEVENTH AMENDMENT BAR TO AN AWARD OF ATTORNEYS' FEES AGAINST A STATE HAS NOT BEEN MODIFIED BY THE FOURTEENTH AMENDMENT.

The argument has been made that the Eleventh Amendment bar to an award of attorneys' fees has been abrogated by the Fourteenth Amendment. A similar argument has been asserted to support a retroactive damage award against the state. *See Fitzpatrick v. Bitzer,* 519 F.2d 559, 569 (2nd Cir. 1975). The argument is based on the presumption that the Fourteenth Amendment must be deemed to have modified the Eleventh Amendment in the area of civil rights and to have empowered Congress to expand the scope of federal jurisdiction beyond the limits set forth in the Constitution.

Amicus submits that the rationale of *Edelman, supra,* compels the conclusion that the power of the Legislature is limited by the Eleventh Amendment. The fact that the Fourteenth Amendment was enacted after the Eleventh Amendment does not grant Congress the power to impose attorneys' fees against

a state. As stated by the Seventh Circuit in *Townsend v. Edelman,* 518 F.2d 116, 120-121:

> "The fact that the Fourteenth Amendment was enacted after the Eleventh Amendment does not abrogate the latter in cases involving the former. The two amendments must be interpreted in light of each other. This is precisely the effect of *Edelman.* By allowing actions against state officials for injunctive prospective relief whether it be for violations of the equal protection clause or the supremacy clause, while limiting relief to exclude retroactive monetary awards, the Court has struck a balance between the need for obtaining relief from state officials and the Eleventh Amendment right of states not to have their public treasuries severely depleted by large retroactive awards."

Amicus submits that the same reasoning applies to an award of attorneys' fees.

III

A STATE DOES NOT LOSE ITS PROTECTION UNDER THE ELEVENTH AMENDMENT ABSENT A CLEAR DECLARATION TO SUBMIT ITSELF TO SUIT IN FEDERAL COURT.

In deciding whether a state has waived its constitutional protection under the Eleventh Amendment, this Court has stated:

> ". . . we will find waiver only where stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.' *Murray v. Wilson Distilling Company,* 213 U.S. 151,

171 (1909). We see no reason to retreat from the Court's statement in *Great Northern Insurance Company v. Read,* 322 U.S. at 54 (footnote omitted).

> '[W]hen we are dealing with the sovereign exemption from judicial interference in the vital field of financial administration a clear declaration of the state's intention to submit its fiscal problems to other courts than those of its own creation must be found.'" *Edelman v. Jordan, supra,* 415 U.S. at 673.

Even in those cases in which a state has specifically waived the sovereign immunity and consented to suit by its own citizens, this Court has held that the Eleventh Amendment has not been waived without a clear showing that the state consented to suit in a *federal court. Smith v. Reeves,* 178 U.S. 436 (1899); *Chandler v. Dix,* 194 U.S. 590 (1903); *Great Northern Ins. Co. v. Read,* 322 U.S. 47 (1944).

Since the State of Connecticut gave no express waiver of its immunity from suit with respect to Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-5(k), it cannot be subject to any of the statutes' provisions.

IV

AN AWARD OF ATTORNEYS' FEES AGAINST A STATE MAY NOT BE PREDICATED UPON THE COMMON FUND OR BAD FAITH EXCEPTIONS TO THE AMERICAN RULE PROHIBITING AN AWARD OF ATTORNEYS' FEES.

In *Alyeska Pipeline Service Company v. Wilderness Society, supra,* this Court disapproved the "pri-

vate attorney general" approach as a basis for court-awarded attorneys' fees in public interest litigation unless authorized by statute. However, dicta in the opinion appears to recognize the continuing validity of the "common fund" and "bad faith" exceptions to the traditional American rule limiting an award of attorneys' fees. Amicus submits that the *dicta* in *Alyeska* has no application in the instant case. The Eleventh Amendment bars any such award against the state.

The common fund theory is inapplicable since any fund in a suit against a state official or state agency would necessarily come from the state treasury. However, since *Edelman, supra,* precludes an award of monetary relief from the state treasury, no fund would be available from which to reimburse litigants.

The "bad faith" exception mentioned in *Alyeska* is also inapplicable. This issue was not discussed in *Alyeska, supra,* as the Court of Appeals deemed it inappropriate to burden the State of Alaska with any part of the award. 421 U.S. at 246. Amicus submits that the Eleventh Amendment bars an award of attorneys' fees when injunctive relief is sought against a state official. In such a case, the purpose of the action is to remedy a state practice, not to impose a monetary liability against the state for past deprivations of constitutional rights. A state official has both the right and the duty to follow state law. When a state law or procedure is alleged to conflict with a constitutional right and a federal suit is filed, the official, *as an officer of the state,* defends the state

interest and, *as an officer of the state,* will, if ordered, comply with the court order. In such a case the state is the real party in interest. The official is merely a nominal party.[1] To award attorneys' fees on a "bad faith" theory based on the official's acts is tantamount to an award of attorneys' fees against the state and is therefore barred by the Eleventh Amendment. Granting attorneys' fees in an injunctive suit against a state official by labeling the conduct "bad faith" is as much an evasion of the Eleventh Amendment bar as labeling a retroactive monetary award against a state "equitable restitution." In both cases the real party in interest, the state, is being ordered by a federal court to hand over state funds to a private party. In both cases, the Eleventh Amendment, as explained in *Edelman,* prohibits such an award.

This is not to say that an individual state official cannot be held personally responsible for a direct and knowing contempt of a federal court order, or that an individual state official cannot be personally liable for damages in a proper suit in which the plaintiff overcomes the official's qualified executive immunity. *See Scheuer v. Rhodes,* 416 U.S. 232, 238 (1973). However, amicus submits that in a contempt proceeding for a damage suit, unlike his position in a suit seeking injunctive relief, the state official is *himself* the real party in interest.

Redress for the personal acts of state officials during the pendency of an injunctive suit may not be

---

[1]This fact is recognized in Rule 25(d) of the Federal Rules of Civil Procedure, which allows substitution of officials in suits seeking injunctive relief.

had under the guise of an award of attorneys' fees. Such redress must be sought only in contempt proceedings or a damage action.

CONCLUSION

Amicus submits that recovery of attorneys' fees against a state would have a direct and significant impact on the public treasury and is barred by the Eleventh Amendment. Congress does not have the power to abrogate the Eleventh Amendment legislatively, and Connecticut has not waived its Eleventh Amendment immunity. Recovery of attorneys' fees against a state under the common fund or bad faith exceptions is also invalid.

Dated, February 12, 1976.

Respectfully submitted.

EVELLE J. YOUNGER,
Attorney General of the State of California,
JACK R. WINKLER,
Chief Assistant Attorney General—
Criminal Division,
EDWARD P. O'BRIEN,
Assistant Attorney General,
GLORIA F. DEHART,
Deputy Attorney General,
PATRICK G. GOLDEN,
Deputy Attorney General,

Attorneys for Amicus Curiae
State of California.

Supreme Court, U. S.
FILED
MAR 16 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-283

FREDERICK BITZER, *et al.*,

Petitioners,

v.

DONALD MATTHEWS, *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE N.A.A.C.P. LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AS *AMICUS CURIAE*

JACK GREENBERG
ERIC SCHNAPPER
Suite 2030
10 Columbus Circle
New York, New York 10019

Attorneys for Amicus Curiae

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-283

FREDERICK BITZER, *et al.*,

Petitioners,

v.

DONALD MATTHEWS, *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE N.A.A.C.P. LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AS *AMICUS CURIAE*

Interest of *Amicus*

The N.A.A.C.P. Legal Defense and Educational Fund, Inc., is a non-profit corporation, incorporated under the laws of the State of New York in 1939. It was formed to assist Negroes to secure their constitutional rights by the prosecution of lawsuits. Its charter declares that its purposes include rendering legal aid gratuitously to Negroes suffering injustice by reason of race who are unable, on account of poverty, to employ legal counsel on their own behalf. The charter was approved by a New York Court, authorizing the organization to serve as a legal aid society.

The N.A.A.C.P. Legal Defense and Educational Fund, Inc. is independent of other organizations and is supported by contributions from the public. For many years its attorneys have represented parties in this Court and the lower courts, and it has participated as *amicus curiae* in this Court and other courts in cases involving many facets of the law.

Attorneys for the Legal Defense Fund have handled many cases involving Title VII of the Civil Rights Act of 1964 and other problems of racial discrimination. Among these are three cases in this Court regarding awards of counsel fees in civil rights litigation. *Newman* v. *Piggie Park Enterprises,* 309 U.S. 400 (1968); *Bradley* v. *School Board of the City of Richmond,* 416 U.S. 696 (1974); *Northcross* v. *Board of Education,* 412 U.S. 427 (1973).

ARGUMENT

For the reasons set forth in the Brief for Petitioners in *Fitzpatrick* v. *Bitzer,* No. 75-251, pp. 40-61, *amicus* maintains that Congress has the authority under section 5 of the Fourteenth Amendment to render a state liable to suit in federal court for monetary or other relief, and that Title VII of the 1964 Civil Rights Act, insofar as it authorizes awards of back pay and counsel fees against a state, is therefore constitutional. Even in the absence of that authority, or of a statute expressly authorizing awards of counsel fees against a state, we urge that such awards are incidental to actions against state officials for injunctive or declaratory relief and thus fall within the exception the Eleventh Amendment articulated in *Ex Parte Young,* 209 U.S. 123 (1908).

Although the state of Connecticut is not a formal party to this action, it does not claim that it is a stranger to this

litigation against whom no relief could run for want of notice or hearing. When this action was commenced against the individual defendants the state could have refused to become involved in the case, leaving the defendants to fend for themselves and defend it, or offer judgment, as they pleased. Instead, from the moment this action was filed, the state chose to assume complete control over the defense, receiving and serving all papers, negotiating with the plaintiffs, and making all substantive and tactical decisions. Mr. Bitzer, although the named defendant, has never participated in the litigation or retained his own counsel. The state sought to win in this case a judgment that would bar relief for the named plaintiffs and, by reason of collateral estoppel or *stare decisis,* effectively preclude similar actions by other plaintiffs against other state officials or the state itself. The state has availed itself of all legal procedures it wished to advance its views; if costs were awarded in this action against the plaintiffs, that money would go, not into Mr. Bitzer's pocket, but into the state treasury.

The state cannot inject itself into this litigation, seizing control of the defense and seeking all the fruits of a legal victory, and yet avoid the normal responsibilities and liabilities of a litigant. A non-party who has an interest in the outcome of litigation and who fully participates therein is normally deemed liable to judgment just as if he were a formal party. *Souffront* v. *Compagnie des Suceries,* 217 U.S. 475, 486-87 (1910)[1] "[O]ne who prosecutes or defends a suit in the name of another, to establish and protect his own right, or who assists in the prosecution or defense of an

---

[1] *Dick Press Guard Mfg. Co.* v. *Bowen,* 229 F. 193, 196 (N.D. N.Y.), *aff'd,* 229 F. 575 (2d Cir.) *cert. denied,* 241 U.S. 671 (1915); *Ocean Accident & Guarantee Corp.* v. *Felgemaker,* 143 F.2d 950, 952 (6th Cir. 1944); *Eagle Mfg. Co.* v. *Miller,* 41 F. 351, 357 (S.D. Iowa 1890).

action in aid of some interest of his own, and who does so openly, to the knowledge of the opposing party, is as much bound by the judgment, . . . as he would be if he had been a party to the record." A state may elect to stand aloof from litigation against an official and to thus preserve intact any immunity it may enjoy; but if it chooses to join in the litigation and to seek to win and enjoy the benefits of a successful defense, it must run the same risks, including the possibility of an award of costs, that must be run by an ordinary party should that defense fail. Compare 2A Moore's Federal Practice ¶ 12.13.

It is for this reason that the federal courts have traditionally awarded costs against a state, directly or through its officials, when the state becomes involved in litigation in a federal court in its own name or on behalf of its officials. Since the Judiciary Act of 1789[2] the federal courts have been expressly empowered to award costs. Provisions authorizing, and at times requiring, the award of costs and expenses are to be found throughout the Federal Rules of Civil Procedure,[3] the Federal Rules of Criminal Procedure,[4] the Federal Rules of Appellate Procedure,[5] the Rules of the Supreme Court,[6] and the United States Code.[7] These rules and statutes are literally applicable to all federal litigation, regardless of the identity of the parties, and have been uniformly applied even where the party liable

---

[2] 1 Stat. 73, 93; *Henkel* v. *Chicago, etc., R.R.*, 284 U.S. 444 (1932).

[3] Federal Rules of Civil Procedure, Rules 30(g), 37(a)(4), 41(d), 43(f), 54, 55(b)(1), 56(g), 65(c), 68.

[4] Federal Rules of Criminal Procedure, Rule 38(a)(3).

[5] Federal Rules of Appellate Procedure, Rules 7, 38, 39.

[6] Rules of the Supreme Court, Rules 14, 18, 36(3), 57, 60.

[7] See e.g. 28 U.S.C. §§ 1331, 1332, 1446, 1911-29, 2101(f), 2103.

for costs is a state or a state official. The Clerk of this Court taxes costs against a losing party without regard to the official status of that party. Costs are routinely awarded by this Court against (a) state officials who are the defendants in federal civil actions for injunctive relief, (b) state officials who are the defendants in federal habeas corpus actions, (c) state agencies which are the defendants in civil actions originating in state court, and (d) states in criminal prosecutions originating in state courts. A list of the cases in which such awards were made in October Terms 1970-74 is set out in the Appendix to this brief.

The state in this case does not appear to deny that, as a general matter, the federal courts may award costs against states and state officials. Such awards are the normal incident of a successful action for declaratory or injunctive relief, and their "ancillary effect on the state treasury is a permissible and often an inevitable consequence of the principle announced in *Ex Parte Young*." *Edelman* v. *Jordan*, 415 U.S. 651, 668 (1974). Were this Court to hold such awards impermissible under the Eleventh Amendment, it would be required to rule unconstitutional, insofar as they apply to states or state officials, every federal court rule and every provision of the United States Code authorizing awards of costs.

The state officials maintain, however, that counsel fees cannot be included among the awardable costs. There is, we believe, no basis for distinguishing counsel fees from other items of costs, such as transcripts, printing expenses, filing or docketing fees, or the expenses of witnesses, experts or interpreters. Awards of counsel fees, where proper, have long been regarded as a part of costs. The earliest authority for such awards in England was contained in a statute adopted in 1278 providing for taxation of "costs

of his writ purchased." [8] The first congressional enactment regulating the award of counsel fees treated them as an item of taxable costs. 10 Stat. 161 (1853); see 28 U.S.C. § 1923(a). In recent years Congress has adopted more than a score of statutes authorizing awards of attorneys' fees; in virtually every case that award was made an item to be included as part of the taxable costs.[9] This Court has

---

[8] Statute of Gloucester, 1278, 6 Edw. 1, c 1; *Fleischman Distilling Corp.* v. *Maier Brewing Co.*, 388 U.S. 714, 717, n. 7 (1967).

[9] See e.g. 5 U.S.C. § 552(a) (court may assess "attorneys' fees and other litigation costs"); 7 U.S.C. § 210(f) (successful petitioner to be allowed "a reasonable attorney's fee to be taxed and collected as part of the costs of the suit"); 7 U.S.C. § 499g (b) (successful petitioner to be allowed "a reasonable attorney's fee to be taxed and collected as a part of the costs of the suit"); 15 U.S.C. § 15 (plaintiff in antitrust action to recover "the cost of suit, including a reasonable attorney's fee"); 15 U.S.C. § 72 (person injured by illegal importation to recover "the cost of the suit, including a reasonable attorney's fee"); 15 U.S.C. § 77k(e) (court may award to prevailing party "the costs of such suit, including reasonable attorney's fee"); 15 U.S.C. § 78i(e) (court in securities case may "assess reasonable costs, including reasonable attorneys' fees"); 15 U.S.C. § 78r(a) (court may "assess reasonable costs, including reasonable attorneys' fees"); 17 U.S.C. § 116 (court in patent action may award "a reasonable attorney's fee as part of the costs"); 18 U.S.C. § 1964(c) (person injured by racketeering may sue and recover "the cost of the suit, including a reasonable attorney's fee"); 20 U.S.C. § 1617 (court in school desegregation case may allow "a reasonable attorney's fee as part of the costs"); 33 U.S.C. § 1365(d) (court may award "costs of litigation (including reasonable attorney and expert witness fees)"); 33 U.S.C. § 1415(g)(4) (court may award "costs of litigation (including reasonable attorney and expert witness fees)"); 42 U.S.C. § 1857h-2(d) (court may award "costs of litigation (including reasonable attorney and expert witness fees)"); 42 U.S.C. § 2000a-3(b) (court in public accommodations case may allow "a reasonable attorney's fee as part of the costs"); 42 U.S.C. § 2000e-5(k) (court in employment discrimination case may allow "a reasonable attorney's fee as part of the costs"); 42 U.S.C. § 4911(d) (court may award "costs of litigation (including reasonable attorney and expert witness fees)"); 45 U.S.C. § 153(p) (court in Railway Labor Act case must allow prevailing employee "a reasonable attorney's fee, to be taxed and collected as part of the costs of the suit"); 46 U.S.C. § 1227 (successful

also recognized a variety of circumstances in which counsel fees can be awarded without express statutory authority, but these awards too have been treated as "a matter of costs." *Trustees* v. *Greenough,* 105 U.S. 527 (1882).

The limitation of the Eleventh Amendment clearly does not extend to an award of costs, and any item may constitutionally be included in the costs taxed which is in fact an expense of the litigation. To say that all actual expenses may constitutionally be made part of costs is not, of course, to suggest that Congress or the courts are obligated to make such awards. Under the applicable federal rules and statutes some such expenses are taxable and others are not; Congress "has the power and judgment to pick and choose among its statutes and to allow attorneys' fees under some but not others." *Alyeska Pipeline Service Co.* v. *Wilderness Society,* 44 L.Ed. 2d 141, 157 (1975). But counsel fees, like printing, transcripts or filing costs, are unquestionably an incidental expense of the litigation; when Congress, or the courts exercising traditional equity powers, authorize or order awards for such expenses, the Eleventh Amendment does not afford to the states any protection from the responsibilities of ordinary litigants to comply with such awards.

---

plaintiff to recover "the cost of suit, including a reasonable attorney's fee"); 47 U.S.C. § 206 (court to award "reasonable counsel or attorney's fee" which "shall be taxed and collected as part of the costs in the case"); 49 U.S.C. § 8 (court to award "reasonable counsel or attorney's fee" which "shall be taxed and collected as part of the costs of the case"); 49 U.S.C. § 16(2) (court to award "reasonable attorney's fee, to be taxed and collected as part of the costs of the suit"); 49 U.S.C. § 908(b) (court to award "a reasonable counsel or attorney's fee" which "shall be taxed and collected as part of the costs in the case.")

CONCLUSION

For these reasons the judgment of the court of appeals in No. 75-283, should be affirmed.

Respectfully submitted,

JACK GREENBERG
ERIC SCHNAPPER
Suite 2030
10 Columbus Circle
New York, New York 10019

Attorneys for Amicus Curiae

APPENDIX

APPENDIX

This Appendix sets forth cases in which the Clerk of the Supreme Court has awarded costs against a state, or a state official, during October Terms, 1970-74. With regard to awards against state officials, the list is limited to actions for injunctive relief against the defendant in his official capacity, in which the action was defended by the state and where, as a consequence, there was no suggestion that the costs would be paid by the defendant personally. Costs have also been awarded in damage actions against state officials, e.g. *Schever* v. *Rhodes,* No. 72-914; these cases, however, are not included, since, although the costs are in fact usually paid by the state, the defendant officials were personally liable.

(a) Civil actions for injunctive relief against state officials, originating in federal court, in which costs were awarded to the plaintiff:

Connor v. *Waller,* No. 74-1509 (Defendant was the Governor of Mississippi);

Meek v. *Pittinger,* No. 73-1765 (Defendants were the Secretary of State and Treasurer of Pennsylvania);

Chapman v. *Meier,* No. 73-1406 (Defendant was the Secretary of State of North Dakota);

Hagans v. *Levine,* No. 72-6476 (Defendant was the Commissioner of the New York State Department of Social Services);

Communist Party of Arizona v. *Whitcomb,* No. 72-1040 (Defendant was the Secretary of State of Indiana and the members of the Indiana State Election Board);

Christian v. *New York Department of Labor*, No. 72-5704 (Defendants included officials of the New York Department of Labor);

Committee for Public Education v. *Nyquist*, No. 72-694 (Defendant was the New York Commissioner of Education);

Norwood v. *Harrison*, No. 72-77 (Defendants were the members of the Mississippi State Textbook Purchasing Board);

Papish v. *Board of Curators of University of Mississippi*, No. 72-794 (Defendants were officials of the state university);

Healy v. *James*, No. 71452 (Defendant was the President of Central Connecticut State College);

Fuentes v. *Shevin*, No. 70-5039 (Defendant was the Attorney General of Florida);

Taylor v. *McKeithen*, No. 71-784 (Defendant was the Governor of Louisiana);

Townsend v. *Swank*, No. 70-5021 (Defendant was the Director of the Illinois Department of Public Aid).

(b) Civil Actions for injunctive or monetary relief, against a state or state official, originating in state court, in which costs were awarded to the plaintiff:

Austin v. *New Hampshire*, No. 73-2060;

Mescalero Apache Tribe v. *Jones*, No. 71-738;

McClanahan v. *Arizona State Tax Commission*, No. 71-834;

Evco v. *Jones*, No. 71-857;

Matz v. *Arnet*, No. 71-1182;

Bonnelli Cattle Corp. v. *Arizona*, No. 72-397.

(c) Habeas corpus actions against state officials, originating in federal court, in which costs were awarded to the petitioner:

Francisco v. *Gathright*, No. 73-5768;

Robinson v. *Neil*, No. 71-6272;

Peters v. *Kiff*, No. 71-5078;

Loper v. *Beto*, No. 70-5388;

Humphrey v. *Kady*, No. 70-5004;

Morrissey v. *Brewer*, No. 71-5103.

(d) Criminal prosecutions arising in state court in which costs were awarded to the defendant:

Brown v. *Illinois*, No. 73-6650;

Faretta v. *California*, No. 5772;

Herring v. *New York*, No. 73-6587;

Bigelow v. *Virginia*, No. 73-1309;

Drepe v. *Missouri*, No. 73-6038;

Antoine v. *Washington*, No. 73-717;

Taylor v. *Louisiana*, No. 75-5744;

Jenkins v. *Georgia*, No. 73-557;

Spence v. *Washington*, No. 72-1690;

Codispoti v. *Pennsylvania*, No. 73-5615;

Appendix

Davis v. *Alaska*, No. 72-5794;

Alexander v. *Virginia*, No. 71-1315;

Roaden v. *Kentucky*, No. 71-1134;

Chambers v. *Mississippi*, No. 71-5908;

Furman v. *Georgia*, No. 69-5003;

Jackson v. *Georgia*, No. 69-5030;

Branch v. *Texas*, No. 69-5031;

Turner v. *Arkansas*, No. 71-1309;

Brooks v. *Tennessee*, No. 71-5313;

Jackson v. *Indiana*, No. 70-5009;

Columbo v. *New York*, No. 71-352;

Smith v. *Florida*, No. 70-5055;

Rabe v. *Washington*, No. 71-247;

Alexander v. *Louisiana*, No. 70-5026;

Stanley v. *Illinois*, No. 70-5014;

Camp v. *Arkansas*, No. 70-353;

Santebello v. *New York*, No. 70-98.

Supreme Court, U. S.
FILED
MAR 15 1976
MICHAEL RODAK, JR., CLERK

No. 75-283

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

FREDERICK BITZER, ET AL.,
Petitioners,

v.

DONALD MATTHEWS, ET AL.,
Respondents.

BRIEF ON ATTORNEYS' FEES FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, AND THE AMERICAN CIVIL LIBERTIES UNION, AS *AMICI CURIAE*

VILMA MARTINEZ
JOEL CONTRERAS
MORRIS J. BALLER
Mexican-American Legal Defense and Educational Fund
145 Ninth Street
San Francisco, California

MELVIN L. WULF
E. RICHARD LARSON
American Civil Liberties Union
New York, N.Y. 10016
22 East 40th Street

ARMAND DERFNER
PAUL R. DIMOND
WILLIAM E. CALDWELL
Lawyers' Committee for Civil Rights Under Law
733 15th St., N.W.
Washington, D.C.

NATHANIEL R. JONES
General Counsel, NAACP
1790 Broadway
New York, N.W. 10019

Attorneys for Amici Curiae

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

TABLE OF CONTENTS

	Page
INTEREST OF AMICI CURIAE	1
INTRODUCTION	2
I. ATTORNEYS' FEES, LIKE OTHER ITEMS OF COSTS, ARE PERMISSIBLE INCIDENTS OF LITIGATION AND MAY BE ASSESSED AGAINST THE STATE DEFENDANTS	3
II. EVEN IF ATTORNEYS FEES WERE NOT TO BE CONSIDERED AS PART OF THE TAXABLE COSTS *PER SE*, THE ELEVENTH AMENDMENT DOES NOT BAR FEE AWARDS AGAINST THE STATE DEFENDANTS	7
CONCLUSION	12

TABLE OF CITATIONS

Cases: Page

Albemarle Paper Co. v. *Moody*, 422 U.S. 905 (1975) 9-10
Allen v. *State Board of Elections*, 393 U.S. 544 (1969) 4n
Alyeska Pipeline Service Co. v. *Wilderness Society*, 421 U.S. 240 (1975) 4n, 5
Bell v. *Hood*, 327 U.S. 678 (1946) 7
Bond v. *Stanton*, No. 75-1459 (7th Cir. Jan. 7, 1976) 11n
Cherokee Nation v. *Oklahoma*, 397 U.S. 620 (1970) 4n
Boston Chapter NAACP, Inc. v. *Beecher*, 504 F.2d 1017 (1st Cir. 1974), cert. denied, 421 U.S. 910 (1975) 4n
Class v. *Norton*, 505 F.2d 123 (2d Cir. 1975) 4n, 11n
Chapman v. *Meier*, 420 U.S. 1 (1975) 4n
Connor v. *Williams*, 404 U.S. 599 (1972) 4n
Edelman v. *Jordan*, 415 U.S. 662 (1974) 5n, 7, 10-12
Epperson v. *Arkansas*, 393 U.S. 97 (1968) 4n
Ex Parte Young, 290 U.S. 123 (1908) 7, 8n, 10-12
Fairmont Creamery Co. v. *Minnesota*, 275 U.S. 270 (1927) 3-6
Hall v. *Cole*, 412 U.S. 1 (1973) 10n
Hans v. *Louisiana*, 134 U.S. 1 (1890) 5n
General Oil Co. v. *Crain*, 209 U.S. 211 (1908) 7-8
Goldfarb v. *Virginia State Bar*, 421 U.S. 773 (1975) 4n
Jenkins v. *Georgia*, 418 U.S. 153 (1974) 4n
Jordon v. *Gilligan*, 500 F.2d 701 (6th Cir. 1974), cert. denied, 421 U.S. 991 (1975) 11n
Keyes v. *School District No. 1*, 413 U.S. 189 (1973) 5n
Louisiana v. *United States*, 380 U.S. 145 (1966) 7
McClanahan v. *State Tax Commission of Arizona*, 411 U.S. 164 (1973) 4n
Milliken v. *Bradley*, 418 U.S. 717 (1974) 5n
Newman v. *Piggie Park Enterprises*, 390 U.S. 400 (1968) 9

TABLE OF CITATIONS—Continued

	Page
Sims v. *Amos*, 340 F.Supp. 691 (M.D.Ala. 1972), aff'd, 409 U.S. 942 (1972)	4n
Skehan v. *Board of Trustees*, 501 F.2d 31 (3d Cir. 1974), vacated, 421 U.S. 983 (1975)	11n
Souza v. *Travisono*, 512 F.2d 1137 (1st Cir. 1975)	11n
Spence v. *Washington*, 418 U.S. 405 (1974)	4n
Thonen v. *Jenkins*, 517 F.2d 3 (4th Cir. 1975)	11n
Virginian Ry. Co. v. *System Federation*, 300 U.S. 515 (1937)	7
Statutes:	
7 U.S.C. §§ 210(f), 499g(b), 2305(c)	5n
12 U.S.C. § 1975	5n
15 U.S.C. §§ 15, 72, 77k(e), 77www(a), 78i(e), 78r(a), 298(b)	5n
17 U.S.C. § 116	5n
18 U.S.C. § 1964(c)	5n
28 U.S.C. §§ 1920 and 1923	6
20 U.S.C. § 1617	5n, 9n
33 U.S.C. §§ 1365(d), 1415(g)(4)	5n
42 U.S.C. §§ 1857h-2(d), 2000a-3(b), 4911d	5n
42 U.S.C. §§ 2000e-5(c) and (d)	9
42 U.S.C. § 2000e-5(f)(5)	6n
42 U.S.C. § 2000e-5(k)	2n, 5
45 U.S.C. § 153(p)	5n
46 U.S.C. § 1227	5n
47 U.S.C. § 206	5n
49 U.S.C. §§ 8, 16(2), 908(b), 908(e)	5n
5 Stat. 518 (Act of August 23, 1842)	5
17 Stat. 348 (Act of June 10, 1872)	9n
Miscellaneous:	
M. Berger, Equality By Statute (1967)	9n
117 Cong. Rec. S. 5327-28, 5537 (April 1971)	9n
H.R. Rep. No. 92-283, 92nd Cong., 1st Sess. 17 (1971)	8

TABLE OF CITATIONS—Continued

	Page
S. Rep. No. 94-295, 94th Cong., 1st Sess. 41 (1975)	5n
Note, Attorneys' Fees and The Eleventh Amendment, 88 Harv. L. Rev. 1875 (1976)	5n
C. Wright, Handbook of the Law of Federal Courts (2d. Ed. 1970)	7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-283

FREDERICK BITZER, ET AL.,
Petitioners,

v.

DONALD MATTHEWS, ET AL.,
Respondents.

BRIEF ON ATTORNEYS' FEES FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, AND THE AMERICAN CIVIL LIBERTIES UNION, AS *AMICI CURIAE*

INTEREST OF *AMICI CURIAE*

Amici are non-profit organizations whose common goal is to secure the civil right of American citizens to equal treatment under law, including at the hands of state officials and agencies. Each therefore has a vital interest in the resolution of the issue of whether Congress may authorize the award of attorneys' fees as part of the court costs to be assessed under Title VII against state employers who engage in discriminatory employment practices.*

---

* This brief is filed, pursuant to Rule 42(2), with the consent of the parties. *Amici* previously filed a brief advising the Court of their views on the backpay and Eleventh Amendment issues in No. 75-251; and the letters of consent have been previously filed with the Clerk.

INTRODUCTION

The question in No. 75-283 is whether Congress has the constitutional power to authorize federal courts to award attorneys' fees as part of the taxable costs when they enjoin state officials from committing discriminatory employment practices.[1]

Amici curiae file this brief as a companion to their brief filed in No. 75-251, which dealt with the constitutionality of a backpay award in this case. In that brief we discussed the proposition that state immunity, either at common law or by the terms of the Eleventh Amendment, does not extend to Congress' authority to create causes of action, pursuant to its enumerated and supreme powers under the Constitution, which result in awards against the states. We also argued that, even if Congress' power was so limited prior to 1868, the adoption of the Fourteenth Amendment provided the necessary authorization in this case.[2]

If an award of backpay in a Title VII suit against state officials is constitutionally valid, an award of attorneys' fees is *a fortiori* constitutional. But even if the authorization of backpay were held beyond the power of Congress, award of attorneys' fees against state officials would still be appropriate for the reasons set forth in this brief.

---

[1] Plaintiffs, having gained injunctive relief in this case, requested attorneys' fees, pursuant to 42 U.S.C. § 2000e-5(k), in the amount of $6,275, for 137.5 hours at rates of $50 and $30 per hour. The Court of Appeals held that the state defendants are not immune from such a request. *Fitzpatrick* v. *Bitzer*, 519 F.2d 559, 571-72 (2d Cir. 1975).

[2] This second argument was developed in detail in the brief *amicus curiae* filed on behalf of the United States.

I. ATTORNEYS' FEES, LIKE OTHER ITEMS OF COSTS, ARE PERMISSIBLE INCIDENTS OF LITIGATION AND MAY BE ASSESSED AGAINST THE STATE DEFENDANTS.

The defendants in this case do not claim that Congress may not authorize awards of attorneys' fees as costs against employers in general who are guilty of employment discrimination. Rather, the defendants' sole challenge is that, as state officials, they alone are not subject to such costs. This argument is foreclosed by the decision in *Fairmont Creamery Co.* v. *Minnesota*, 275 U.S. 70 (1927).

A. A half-century ago, Minnesota made the same explicit claim that, as a sovereign state, it could not be taxed with the prevailing party's costs of suit. This Court held that a state can be made to bear the expenses of proceedings in federal court:

> But is the state to be regarded as the sovereign here? This court is not a court created by the state of Minnesota. The case is brought by a writ of error issued under the authority of the United States by virtue of the Constitution of the United States. It is not here by the state's consent but by virtue of a law, to which it is subject. Though a sovereign, in many respects, the state when a party to litigation in this court loses some of its character as such.

275 U.S. at 74. The practice of taxing costs against states in the same way as against other litigants has been invariable and has continued to this day.[3]

---

[3] Several of the State *amici* (though not the defendants) attempt to limit *Fairmont Creamery* on the ground that the case began as a criminal prosecution brought by the State of Minnesota. But the Court made it clear that no such limitation was intended, and that the power to tax costs against any litigant attaches in all cases properly within the Article III jurisdiction of a court of the United States. Thus, the Court "treat[ed] the state just as any other

B. The attorneys' fee issue in this case is settled by the decision in *Fairmont Creamery* because such fees are costs of litigation. They are "incidents of the hearing," which "attach to the regular jurisdiction" of a court of the United States under Article III of the Constitution. 275 U.S. at 77.

The equivalence of costs and fees is established by function and tradition. Both are closely related to the court's power and obligation to manage the litigation before it.[4] And their amount varies with the nature,

---

litigant, and impos[ed] costs on it as such," 275 U.S. at 77; and it referred to 129 cases, dating back to 1860, which show that "the invariable practice has been when the judgment has been against a state in both civil and criminal cases to adjudge costs against it." *Id.*

The Court has continued to apply the *Fairmont Creamery* rule, without distinction, to tax costs against states, state agencies, and state officials; in cases coming up from the federal courts and from the state courts; and in cases where the states are plaintiffs and in cases where the states are defendants. *See, e.g.*, the judgments in *Jenkins* v. *Georgia*, 418 U.S. 153 (1974); *Spence* v. *Washington*, 418 U.S. 405 (1974); *Epperson* v. *Arkansas* 393 U.S. 97 (1968); *Allen* v. *State Board of Elections*, 393 U.S. 544 (1969); *Connor* v. *Williams*, 404 U.S. 549 (1972); *Chapman* v. *Meier*, 420 U.S. 1 (1975); *McClanahan* v. *State Tax Commission of Arizona*, 411 U.S. 164 (1973); *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975); *Cherokee Nation* v. *Oklahoma*, 397 U.S. 620 (1970).

The Question has been raised again recently, and the rule of *Fairmont Creamery* reiterated by two courts of appeals. *Boston Chapter NAACP, Inc.* v. *Beecher*, 504 F.2d 1017, 1028 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975); *Class* v. *Norton*, 505 F.2d 123 (2d Cir. 1974).

[4] For example, if attorneys' fees may not be assessed against state officials, there is no check even on dilatory tactics or other forms of litigation in bad faith. Yet this Court has affirmed an award against the Governor and other officials of Alabama, *Sims* v. *Amos*, 340 F.Supp. 691 (M.D. Ala. 1972), *aff'd*, 409 U.S. 942 (1972), and has subsequently pointed to the bad faith present in the case. *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, 270 n. 46 (1975). *Compare* Rule 37, Fed. R. Civ. P., which specifically authorizes courts to tax attorneys' fees as part of the costs of obtaining discovery from a recalcitrant litigant.

length and complexity of the litigation itself.[5]

In keeping with their functional equivalence, fees have traditionally been regarded by Congress as in the nature of costs. It is true that the general American rule treats attorneys' fees as a *non-taxable* cost; but, as this Court only recently reiterated in *Alyeska*, that is a matter for Congressional determination. 421 U.S. at 270-71. In Title VII Congress has chosen to authorize courts to allow "a reasonable attorney's fee as part of the costs." 42 U.S.C. § 2000e-5(k).[6]

Attorneys' fees have traditionally been included among those costs regulated by general cost statutes, such as the Act of August 23, 1842, which gave this Court power (5 Stat. 518):

---

[5] A recurring theme of the state immunity cases has been concern about the potentially ruinous effect unregulated monetary awards might have upon state treasuries. This concern was most acute in cases like *Hans* v. *Louisiana*, 134 U.S. 1 (1890), involving the size of the state's debt, but it was also alluded to in *Edelman* v. *Jordan*, 415 U.S. 662, 665-66 (1974). In this respect, while an attorneys' fee award will ordinarily be larger than the other costs taxed in a given case, both are invariably so limited that neither could disrupt a state treasury. Indeed, most attorneys' fee awards are miniscule compared with the dollar expense of complying with an injunction. Moreover, many cases involve other taxable costs which are larger than most attorneys' fee awards. *Compare* the $6,750 attorneys' fee requested in this case with the costs awarded *in this Court alone* in such cases as *Milliken* v. *Bradley*, 418 U.S. 717 (1974) ($20,329.60); *Keyes* v. *School District No. 1*, 413 U.S. 189) (1973) ($28,905.48). *See also* the listing of attorneys' fees involved in other cases involving state officials in Note, *Attorneys' Fees and the Eleventh Amendment*, 88 HARV. L. REV. 1875, 1896 n. 126 (1975).

[6] *See also, e.g.*, S. Rep. No. 94-295, 94th Cong. 1st Sess. 41 (1975); 7 U.S.C. §§ 210(f), 499g(b); 15 U.S.C. §§ 15, 77k(e), 77www(a), 78i(e), 78r(a); 17 U.S.C. § 116; 42 U.S.C. §§ 2000a-3(b); 45 U.S.C. § 153(p); 47 U.S.C. § 206; 49 U.S.C. § 16(2); 18 U.S.C. § 1964(c); 20 U.S.C. § 1617; 7 U.S.C. § 2305(c); 12 U.S.C. § 1975; 15 U.S.C. §§ 72, 298(b); 42 U.S.C. § 1857h-2(d); 49 U.S.C. §§ 8, 908(b), 908(e); 33 U.S.C. §§ 1365(d), 1415(g)(4); 42 U.S.C. § 4911(d); 46 U.S.C. § 1227.

> to make and prescribe a table of the various items of costs which shall be taxable and allowed in all suits, to the parties, their attorneys, solicitors, and proctors, to the clerk of the court, to the marshal of the district, and his deputies, and other persons serving processes, to witnesses, and to all other persons whose services are usually taxable in bills of costs.

The same pattern was followed in 1853, when Congress itself undertook to set attorneys' fees, and has continued to the present in the form of 28 U.S.C. §§ 1920 and 1923. Under these provisions, attorneys' fees are retained as taxable costs.

The virtual identity of fees and other items of costs is properly conceded by *amici* Pennsylvania *et al.* (Brief, p. 25): "costs taxed against the state, however minimal, nevertheless are paid from the state treasury, as are attorneys' fees awarded against the state." From this, these state *amici* conclude flatly that "*Fairmont Creamery* should be explicitly overruled." We agree with these State *amici* that the attorneys' fee portion of the judgment below cannot be reversed unless this Court is to overrule *Fairmont Creamery* and leave states and state officials—unlike any other party—immune from the costs of filing, service, court transcripts, and proceedings before special masters.[7] Nothing in the Constitution, our federal system, and an unbroken century of judicial practice commands such an anomalous result.

---

[7] The position of the state officials would even grant them immunity from being taxed with the expenses of reference to a master under Rule 53, Fed. R. Civ. P., notwithstanding the critical role of such procedures in assuring speedy relief in Title VII cases. 42 U.S.C. § 2000e-5(f)(5).

II. EVEN IF ATTORNEYS' FEES WERE NOT TO BE CONSIDERED AS PART OF THE TAXABLE COSTS *PER SE*, THE ELEVENTH AMENDMENT DOES NOT BAR FEE AWARDS AGAINST THE STATE DEFENDANTS.

Congress' authorization of award of attorneys' fees in successful Title VII actions against state employers is essential to suit against state officials under *Ex parte Young* and constitutes a permissible ancillary effect under *Edelman* v. *Jordan*.

A. The formulation of effective remedies has been of central concern to Congress and the federal courts in their enforcement of federal rights, especially civil rights. *Louisiana* v. *United States*, 380 U.S. 145 (1966); *Bell v. Hood*, 327 U.S. 678 (1946); *see Virginian Ry. Co.* v. *System Federation*, 300 U.S. 515 (1937).

This concern was reflected in *Ex parte Young*, 290 U.S. 123 (1908), which enunciated a doctrine that has been called "indispensable to the establishment of constitutional government and the rule of law." C. Wright, *Handbook of the Law of Federal Courts* 186 (2d ed. 1970). The suability of state officers, established by *Ex parte Young*, is no minor exception to the Eleventh Amendment; rather, it is a fundamental mechanism for enforcing rights created by the Constitution and implemented by Congress to protect citizens against acts done in the name of their state government. As this Court said in *General Oil Co.* v. *Crain*, 209 U.S. 211, 226 (1908), decided the same day as *Ex parte Young*:

> Necessarily to give adequate protection to constitutional rights a distinction must be made between valid and invalid state laws, as determining the character of the suit against state officers. And the suit at bar illustrates the necessity. If a suit against state officers is precluded in the national courts by the 11th Amendment to the Constituion, and may be

> forbidden by a state to its courts, as it is contended in the case at bar that it may be, without power of review by this court, it must be evident that an easy way is open to prevent the enforcement of many provisions of the Constitution; and the 14th Amendment, which is directed at state action, could be nullified as to much of its operation.[8]

Nowhere is this more true than in this case. In 1972, when Congress surveyed the results of eight years' experience with Title VII, the chief flaw was that public employees were not covered. Congress recognized the need to provide an effective remedy for the 10 million state and local government employees who it found were victims of "widespread discrimination against minorities . . . perpetuated by the presence of both institutional and overt discriminatory practices." H.R. Rep. No. 92-238, 92d Cong., 1st Sess. 17 (1971). Congress therefore extended the coverage of the anti-discrimination provisions of Title VII to state and local government employers (and to the federal government).

The enforcement mechanism chosen by Congress sought to accommodate the prerogatives of the states, while recognizing that the success of the law would depend primarily upon private enforcement.[9] For example,

---

[8] Nor did the Court regard this as a fanciful possibility, for it was fully aware that government officials may misuse their power even where they do not deliberately set out to interfere with Constitutional rights:

> Zeal for policies, estimable, it may be, of themselves, may overlook or underestimate private rights. The swift execution of the law may seem the only good, and the rights and interests which obstruct it be regarded as a kind of outlawry. *See* Ex parte Young, where this subject is fully discussed and the cases reviewed.

209 U.S. at 227.

[9] Congress was, of course, not required to forego principal reliance upon private enforcement. The alternative would have been an

Congress required that a state employee complaining of discrimination submit his complaint to the Attorney General of the United States for 180 days before instituting a civil action; and that a discrimination complaint arising in a state having an enforcible anti-discrimination law be deferred for 60 days to the appropriate state agency. 42 U.S.C. §§ 2000e-5(c) and (d).

Congress also recognized that authorizing private enforcement was useless without providing the means to obtain counsel by providing for the award of reasonable attorneys' fees. In so implementing Title VII, Congress chose the very method approved most recently by this Court in *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 415 (1975), where this Court determined that the "great public interest in having injunctive actions brought could be vindicated only if successful plaintiffs, acting as 'private attorneys general,' were awarded attorneys' fees in all but very unusual circumstances." *See also Newman* v. *Piggie Park Enterprises*, 390 U.S. 400 (1968).[10]

In Title VII actions against state employers, Congress determined that enforcement of such fundamental federal civil rights cannot be left to the charitable instincts of lawyers or private citizens. Yet the state officials here

---

enormous federal bureaucracy, a route followed in the 1870's, when Congress placed principal reliance for enforcement of the new voting rights on criminal prosecutions in the federal courts. The result in 1873 alone was a total of nearly 1271 prosecutions in the Confederate and Border states at a staggering cost of $3.2 million. M. Berger, EQUALITY BY STATUTE 8 (1967); Act of June 10, 1872, 17 Stat. 348.

[10] Experience has shown that there is no comparable alternative method of providing counsel. Reliance upon the contingent fee system common in some commercial litigation, or upon compulsory appointment of counsel without compensation, would be relatively valueless here. The United States could itself underwrite counsel for successful plaintiffs suing state employers. This method was considered extensively and rejected for obvious rasons in school cases in the Education Amendments of 1972, 20 U.S.C. § 1617. *See, e.g.*, 117 CONG. REC. S.5327-28 (April 21, 1971), 5537 (April 23, 1971).

argue that the attorneys' fees required by the "strong public interest in having injunctive actions brought under Title VII, to eradicate discriminatory employment practices," 422 U.S. at 415, cannot touch them. To say that is to destroy the meaning of *Ex parte Young* and Section 5 of the Fourteenth Amendment.[11]

B. *Edelman* acknowledges that the difference between relief barred by the Eleventh Amendment and that permitted under *Ex parte Young* is often subtle, 415 U.S. at 667. While characterizing the Eleventh Amendment as a protection of the state treasury from potentially ruinous money awards, *Edelman* recognizes that many forms of equitable relief have great fiscal impact on state treasuries; but such an "ancillary effect" is a "permissible consequence" of *Ex parte Young*. 415 U.S. at 668. *Edelman* essentially draws the line between "a monetary loss resulting from a past breach of legal duty on the part of the defendant state officials" (direct effect), and payments which are a necessary consequence of the suit itself (ancillary effect). 415 U.S. at 668.

The distinction is decisive in this case. The normal incidents and consequences of a federal court action—*e.g.*, filing costs, witness fees, and otherwise properly

---

[11] As this Court recognized in upholding an award of attorneys' fees in a labor union democracy case, *Hall* v. *Cole*, 412 U.S. 1, 13 (1973), *quoting* 462 F.2d 777, 780-81 (2d Cir. 1972):

> [N]ot to award counsel fees in cases such as this would be tantamount to repealing the Act itself by frustrating its basic purpose. It is difficult for individual members of labor unions to stand up and fight those who are in charge. The latter have the treasury of the union at their command and the paid union counsel at their beck and call while the member is on his own. . . . Without counsel fees the grant of federal jurisdiction is but a gesture for few union members could avail themselves of it.

If anything, the concept described in *Hall* v. *Cole* applies with even more force when one of the parties is a lone citizen or group of citizens and the other is a state.

awarded attorneys' fees—are so clearly "ancillary" in nature as to seem to render the state officials' assertions of an Eleventh Amendment bar or immunity frivolous.[12]

Such incidents of litigation are not in the nature of actions on pre-existing state debts; they are not "a monetary loss resulting from a past breach of legal duty." They do not derive from the prior conduct of the state or its officials which gave rise to the underlying Title VII cause of action. They are not designed to compensate, nor to provide reparations for, the victims of discrimination. Except for the fact that such costs of litigating also involve dollars, there is *no* resemblance to the "award of damages against the State" which is forbidden by *Edelman*. 415 U.S. at 668.

Rather, the attorneys' fees at issue here are in the nature of an incidental expense of the litigation itself. Congress has authorized such fees as the essential means to permit the underlying Title VII cause of action to proceed. In sum, the award of attorneys' fees here would have only "an ancillary effect on the state treasury [which] is a permissible . . . . consequence of the principle announced in *Ex parte Young*." 415 U.S. at 668.

---

[12] Since *Edelman*, four circuits have upheld awards of attorneys' fees against state officials. *Class* v. *Norton*, 505 F.2d 123 (2d Cir. 1975); *Fitzpatrick* v. *Bitzer*, *supra*; *Souza* v. *Travisono*, 512 F.2d 1137 (1st Cir. 1975), *Thonen* v. *Jenkins*, 517 F.2d 3 (4th Cir. 1975); *Bond* v. *Stanton*, No. 75-1459 (7th Cir. Jan. 7, 1976).

Two circuits, however, have found such fee awards indistinguishable from the retroactive welfare payments condemned in *Edelman*. *Skehan* v. *Board of Trustees*, 501 F.2d 31 (3d Cir. 1974) *vacated*, 421 U.S. 983 (1975); *Jordon* v. *Gilligan*, 500 F.2d 701 (6th Cir. 1974), *cert. denied*, 421 U.S. 991 (1975). The two courts which have denied attorneys' fees against state officials in reliance on *Edelman* have focused only on the fact that money is to be paid from the state treasury, and have ignored the distinction recognized by the court of appeals in this case—the distinction between direct and ancillary effects on state treasuries.

CONCLUSION

For the reasons set forth above, the judgment of the Court of Apeals, insofar as it uphold the power of Congress to authorize attorneys' fees in successful Title VII actions against state employers, should be affirmed.

Respectfully submitted,

VILMA MARTINEZ
JOEL CONTRERAS
MORRIS J. BALLER
Mexican-American Legal Defense and Educational Fund
145 Ninth Street
San Francisco, California

MELVIN L. WULF
E. RICHARD LARSON
American Civil Liberties Union
22 East 40th Street
New York, N.Y. 10016

ARMAND DERFNER
PAUL R. DIMOND
WILLIAM E. CALDWELL
Lawyers' Committee for Civil Rights Under Law
733 15th St., N.W.
Washington, D.C.

NATHANIEL R. JONES
General Counsel, NAACP
1790 Broadway
New York, N.W. 10019

Attorneys for Amici Curiae

see

751

251